FILE COPY

DEC

IN THE

Supreme Court of the United States

October Term, 1929.

No. 491.

J. P. GRUBB, A NATURAL PERSON, PROPOSING TO OPERATE INTERSTATE THE TRI-STATE TRANSIT COMPANY,

Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, ET AL.,

Appellees.

STATEMENT AS TO JURISDICTION ON APPEAL.

FRANK M. RAYMUND,
JOHN F. CARLISLE,
ANDREW WILSON,
Counsel for Appellant.

TOOTHAKER & RODENFELS, Law Printers, Columbus, Ohio.

IN THE

Supreme Court of the United States

October Term, 1929.

No. 491.

J. P. GRUBB, A NATURAL PERSON, PROPOSING TO OPERATE INTERSTATE THE TRI-STATE TRANSIT COMPANY,

Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, WILLIAM KLINGER, JAMES W. HUFFMAN AND FRANK MAULLAR, MEMBERS OF AND CONSTITUTING SAID THE PUBLIC UTILITIES COMMISSION OF OHIO; THE INTERSTATE MOTOR TRANSIT COMPANY, A CORPORATION; THE CANNONBALL TRANSPORTATION COMPANY, A CORPORATION; THE PORTSMOUTH PUBLIC SERVICE COMPANY, A CORPORATION; THE OHIO VALLEY BUS COMPANY, A CORPORATION; THE OHIO VALLEY ELECTRIC RAILWAY COMPANY, A CORPORATION; ELSA CANTOR, SHERIFF, SCIOTO COUNTY, OHIO; ———— SHEETS, CHIEF OF POLICE OF PORTSMOUTH, OHIO, AND THE SHERIFFS OF FRANKLIN COUNTY, PICKAWAY COUNTY, ROSS COUNTY, PIKE COUNTY AND LAWRENCE COUNTY, ALL OF SAID COUNTIES BEING IN THE STATE OF OHIO, AND THE CHIEFS OF POLICE AND MEMBERS OF THE POLICE DEPARTMENT OF THE CITIES, TOWNS AND VILLAGES OF THE STATE OF OHIO, WHOSE NAMES ARE UNKNOWN TO THE PLAINTIFF AND TOO NUMEROUS TO MENTION,

Appellees.

STATEMENT AS TO JURISDICTION ON APPEAL.

May It Please the Court:

The appellant in support of the jurisdiction of this court to review the above entitled cause on appeal respectively represents:

A.

STATUTORY PROVISION SUSTAINING JURISDICTION.

The act of February 13, 1925, Chapter 229, Section 1, 43 Stat., 936, 938 (United States Code, Title 28, Section 345), provides that Section 238 of the Judicial Code is amended to read in part as follows:

> Section 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a District Court may be had where it is provided in the following acts or parts of acts, and not otherwise:
>
> * * * * * * * * * * * * *
>
> (3) An act restricting the issuance of interlocutory injunctions to suspend the enforcement of the statute of a state or of an order made by an administrative board or commission created by and acting under the statute of a state, approved March 4, 1913, which act is hereby amended by adding at the end thereof, "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the District Court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

The act of February 13, 1925, Chapter 229, Section 1, 43 Stat., 938 (United States Code, Title 28, Section 380), provides in the last sentence of Section 266 of the Judicial Code as amended, as follows:

Section 266. * * *

* * * * * * * * * * * * *

"The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the District Court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

B.

DATE OF DECREE AND DATE OF APPLICATION FOR APPEAL.

The decree sought to be reviewed was entered on the nineteenth day of June, 1929 (R., 230)[1].

The application for appeal was presented on the tenth day of July, 1929 (R., 233)[1].

(Time enlarged as per enlargement orders filed with clerk. Rule 11, Para. 1.)

Foot Note[1]. All references to the record are to the pages of the certified unprinted record prepared by the clerk of the District Court and on file with the clerk of this court. The record has not as yet been printed.

C.

NATURE OF CASE AND RULING BELOW.

This is a suit for injunction against the Public Utilities Commission of Ohio, William Klinger, James W. Huffman and Frank Maullar, members of and constituting said the Public Utilities Commission of Ohio; The Interstate Motor Transit Company, a corporation; The Cannonball Transportation Company, a corporation; The Portsmouth Public Service Company, a corporation; The Ohio Valley Bus Company, a corporation; The Ohio Electric Railway Company, a corporation; Elsa Cantor, sheriff, Scioto county, Ohio; ——— Sheets, chief of police of Portsmouth, Ohio, and the sheriffs of Franklin county, Pickaway county, Ross county, Pike county and Lawrence county, all of said counties being in the state of Ohio, and the chiefs of police and members of the police department of the cities, towns and villages of the state of Ohio, whose names are unknown to the appellant and too numerous to mention, seeking to enjoin said commission, et al., appellees, from enforcing or attempting to enforce that part of the order of April 2, 1928, which prohibited appellant from moving his busses in interstate commerce exclusively across and reacross the new interstate bridge over the Ohio river between the states of Ohio and Kentucky at Portsmouth, Ohio, as the same appears in paragraph nine of the bill of complaint (R., 4)[1], and to enjoin them from discriminating against the interstate commerce of the applicant and in favor of the

interstate commerce of The Interstate Motor Transit Company, one of the appellees, paragraph fifteen of the bill of complaint (R., 7, 8)[1]. The rulings of the court below were:

(a) The dissolving of the temporary or preliminary restraining order theretofore granted and allowed (R., 231)[1].

(b) A dismissal of the bill and amendment to the bill seeking permanent injunction (R., 231)[1].

(c) A dismissal of the case (R., 229, 231)[1].

CASES SUSTAINING THE JURISDICTION.

The following decisions of this court are believed to sustain jurisdiction of this appeal:

Clark v. Poor, 274 U. S., 554;
Buck v. Kuykendall, etc., 267 U. S., 307;
Interstate Busses Corporation v. Blodgett, 276 U. S., 245;
Herkness v. Iron, decided by this court, November 19, 1928, 278 U. S., page 92; unofficially reported in 49 Sup. Ct. Rep., page 40.

We respectfully submit that this court has jurisdiction of this appeal by virtue of Sections 238 and 266 of the Judicial Code as amended by the act of February 13, 1925.

Respectfully submitted,
FRANK M. RAYMUND,
JOHN F. CARLISLE,
ANDREW WILSON,
Counsel for Appellant.

Foot Note[1]. All references to the record are to the pages of the certified unprinted record prepared by the clerk of the District Court and on file with the clerk of this court. The record has not yet been printed.

Dated, ..., 1929.

Due and timely service of the foregoing statement of jurisdiction is acknowledged this.....day of ....., 1929.

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Attorneys for Appellees.

FILE COPY

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IN THE

Supreme Court of the United States

No. 491.

J. P. GRUBB, A NATURAL PERSON, ETC.,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, ET AL.,
Appellees.

BRIEF AND RECORD ON BEHALF OF APPELLANT, AND IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM.

JOHN F. CARLISLE,
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INTRODUCTION.

This brief and parts of the record on behalf of appellant is in opposition to the motion of appellees to dismiss or affirm.

The appellant proposing to engage in interstate commerce exclusively as a motor bus common carrier for hire among the states of Ohio, Kentucky and West Virginia under the trade name of The Tri-State Transit Company, applied to the Ohio Public Utilities Commission and expressed willingness to obey and comply with Ohio police laws and regulations and pay Ohio taxes governing motor common carriers. Kentucky had granted its permit but the Ohio commission did not know this. West Virginia granted its certificate, but the Ohio commission did not know this. Neither did the Ohio Supreme Court. Section 614-101, Ohio General Code (Appendix) provides that the Ohio act shall not apply nor be construed to apply to interstate commerce. (Clark v. Poor, 274 U. S., 554.) (Magnuson v. Kelly, 35 Fed. (2nd), 867.) (Fed. Reporter of January 6, 1930.) The state court did not decide the federal question, and if it did, the judgment was void, being outside the scope of state power.

In Buck v. Kuykendall, 267 U. S., 307 and 316, a similar motion was made, but this court overruled the same.

Appellees seek to confine the motion to certain particular paragraphs of the bill and amendment thereto. We insist that the court consider the entire bill and amendment thereto. They are printed in the record of appellees, pages 1 to 25 inclusive. We call to the court's attention paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

and 18, and also paragraph 6 of the amendment to the bill. These paragraphs not only raise the interstate commerce question, but also the question of discrimination against Grubb's interstate commerce and in favor of that of The Interstate Motor Transit Company, a competitor, which corporation was granted September 21, 1927, a certificate to go across the same new interstate toll bridge to Kentucky end and turn and come right back. It so operates now and has been. Grubb's Kentucky permit grants him the right to use this bridge to Ohio, while the Ohio commission prohibits. (See Buck case, supra.)

Appellant was served with copy of motion January 6, 1930. Before this the clerk had estimated cost of printing record as per joint designations of all parties. We sent to appellees the clerk's estimate of their part, the clerk suggesting that same be sent through us. They have not sent their part. We had until February 3, 1930, to send deposit to the clerk. We were waiting on appellees. The statement of points and statement as to the jurisdiction have long since been filed. We have not been guilty of delay.

JOHN F. CARLISLE,
FRANK M. RAYMUND,
ANDREW WILSON,
Counsel for Appellant.

IN THE

Supreme Court of the United States

No. 491.

J. P. GRUBB, A NATURAL PERSON PROPOSING TO Operate Interstate, The Tri-State Transit Company,

Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, William Klinger, James W. Huffman and Frank Maullar, Members of and Constituting Said the Public Utilities Commission of Ohio, The Interstate Motor Transit Company, a Corporation, The Cannonball Transportation Company, a Corporation, The Portsmouth Public Service Company, a Corporation, The Ohio Valley Bus Company, a Corporation, The Ohio Valley Electric Railway Company, a Corporation, Elsa Canter, Sheriff, Scioto County, Ohio, ——— Sheets, Chief of Police of Portsmouth, Ohio, and the Sheriffs of Franklin County, Pickaway County, Ross County, Pike County and Lawrence County, All of Said Counties Being in the State of Ohio, and the Chiefs of Police and Members of the Police Departments of the Cities, Towns and Villages of the State of Ohio, Whose Names are Unknown to the Plaintiff and Too Numerous to Mention,

Appellees.

BRIEF OF APPELLANT CONTRA THE MOTION TO DISMISS OR AFFIRM AND PARTS OF THE RECORD.

HEAD NOTE.

(The letter "R" indicates the part of the record printed and filed by appellees.

The word and letter "appellant R", or the word "Appendix", indicates the part of the transcript of the record, which appellant has had printed as an appendix to this brief against the motion.

The assignment of errors with prayer for reversal and original citation together with other appeal papers and bond were filed with this court November 25th, 1929, along with the transcript of the District Court, this case being docketed at the same time.

The "points and designations", and printed "statements as to the jurisdiction" have also been filed within rule with the clerk of this court.)

THE PARTIES.

The appellant, J. P. Grubb, is a natural person. Prior to January 23, 1928, he had never personally or individually applied for a license, permit or certificate, either intrastate or interstate, to operate a common carrier motor bus line. Between March, 1923, and February 2, 1928, he had been employed by or was a stockholder in two different corporations known as The Cannonball Transportation Company and The Interstate Motor Transit Company. While employed by said corporations he was advised as to what these corporations could legally do in their operations of their motor bus lines between Ohio, Kentucky and West Virginia points by Judge A. Z. Blair, who is one of the counsel for said corporations in this suit, and who was also counsel in Case No. 21098, The Interstate Motor Transit Company, et al., plaintiffs in error v. The Public Utilities Commission of Ohio, Ohio Supreme Court, 119 O. S., 264. (Appellee R., p. 76.)

In his application to the Ohio commission he, personally, under the trade name of The Tri-State Transit Company, proposed to engage in interstate commerce **exclusively** carrying passengers from and to Columbus, Ohio, over U. S. Federal Aid Roads Nos. 23 and 52, via South Portsmouth, Ky., to and from Huntington, West Virginia. Grubb's proposed route was over a new interstate toll bridge over the Ohio river between Portsmouth, O., and South Portsmouth, Ky., which was opened for traffic for

the first time early in September, 1927. The river traffic before this was taken care of by ferry boat. He did not propose to carry any passenger whose whole and complete ride was between Portsmouth, O., and South Portsmouth, Ky., because there were other bus lines and taxicabs that took care of such service. **He was willing to comply with all applicable Ohio uniform police regulations concerning motor bus common carriers, obey Ohio police laws and pay all prescribed taxes.**

The Interstate Motor Transit Company is a corporation, and was then and is now operating a motor bus line in **exclusively** interstate commerce from and to Columbus, O., over U. S. Federal Aid Roads 23 and 52, via South Portsmouth, Ky., to and from Huntington, West Va. It began operation over said new interstate toll bridge between Portsmouth, O., and South Portsmouth, Ky., in September, 1927, by the express certificate of the Public Utilities Commission of Ohio. (See Appendix, Plaintiff's "Exhibit O.") (Also Appendix, Plaintiff's "Exhibit V.")

The Cannonball Transportation Company is a corporation, operating a motor bus line in interstate commerce over U. S. Federal Aid Roads 23 and 52, via South Portsmouth, Ky., from and to Chillicothe, O., from and to Huntington, West Va. It also engages in intrastate commerce operation from and to Columbus, O., via Portsmouth, O., to and from Ironton, O., for the most part over U. S. Federal Aid Roads 23 and 52. It received a permit from the state of Kentucky to operate over said new interstate toll bridge between Portsmouth, O., and South Ports-

mouth, Ky., April 25, 1928. (See Deposition of Kelly, Appendix.)

The Portsmouth Public Service Company is a corporation and operates street cars and busses within the city of Portsmouth, O., but does not operate over or across said new interstate toll bridge between Portsmouth, O., and South Portsmouth, Ky.

The Ohio Valley Bus Company is a corporation and operates a bus line in interstate commerce from Ironton, O., over the bridge there into Kentucky, its operation being about 30 miles up Ohio river from the new interstate toll bridge between Portsmouth, O., and South Portsmouth, Ky.

The Ohio Valley Electric Railway Company is a corporation and at the time this suit was begun was operating street cars on tracks between Portsmouth, O., and Ironton, O., but it never did operate over or across said new interstate toll bridge between Portsmouth, Ohio, and South Portsmouth, Ky., there being no street car tracks in the bridge as plainly appears by Defendant's "Exhibit A", facing page 67 of appellees' printed part of the record.

The Public Utilities Commission is described in paragraphs 2 and 3 of the bill of complaint.

The sheriff and chief of police are described in paragraph 5 of the bill of complaint.

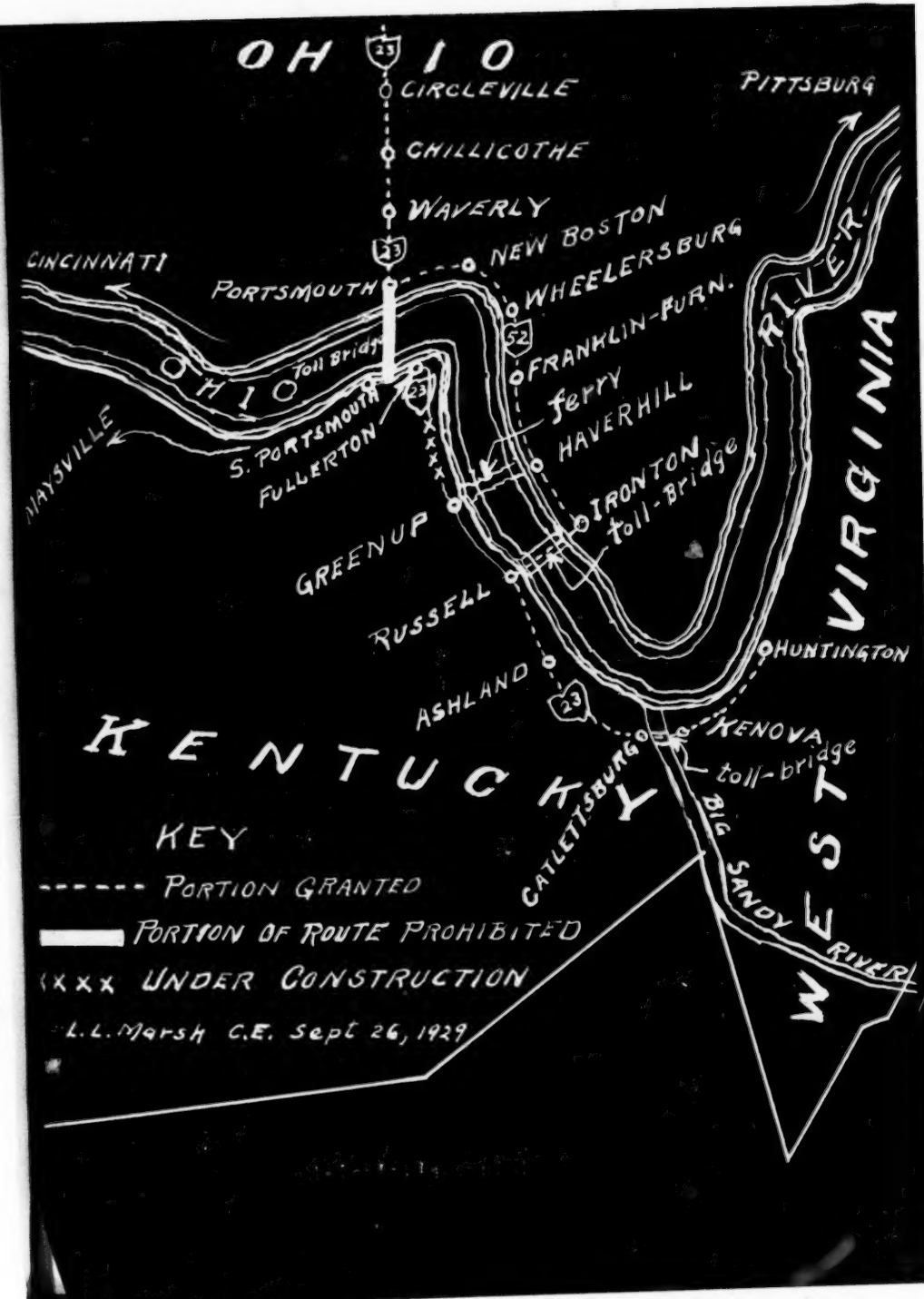
BLUE PRINT MAP SHOWING PART OF THE ROUTE GRANTED AND PART PROHIBITED.

Facing this page is shown a blue print map marked Plaintiff's "Exhibit C", which stipulation has been approved by all counsel, said stipulation being printed in the appendix of this brief. (See appendix this brief.)

This blue print map represents conditions as they existed when Grubb applied to the Ohio commission to engage in interstate commerce **exclusively.**

U. S. Federal Aid Road No. 23 runs from Columbus south and crosses the Ohio river over the new interstate toll bridge to the Kentucky shore, thence east a short distance through Fullerton and then continues up river through Kentucky to Huntington, West Va. **It was then and is now under construction between Fullerton and Greenup.** Said Route 23, coming south, meets U. S. Federal Aid Road 52 in Portsmouth, O. Said Route 52 extends up the Ohio river on the Ohio side to Ironton, O. There is another interstate toll bridge at this point over the Ohio river between Ironton, O., and Russell, Ky. There is still another interstate toll bridge over the Big Sandy river between Catlettsburg, Ky., and Kenova, West Va. **The Ohio state boundary line between Ohio, and Kentucky and West Virginia is low water mark on the Ohio side of the Ohio river.**

The **interstate route** over which Grubb, under the trade name of The Tri-State Transit Company, proposed to operate in interstate commerce **exclusively** between Co-


OHIO
23
CIRCLEVILLE
CHILLICOTHE
WAVERLY
23
NEW BOSTON
WHEELERSBURG
52
FRANKLIN-FURN.
FERRY
HAVERHILL
IRONTON
toll-Bridge
PITTSBURG
RIVER
CINCINNATI
PORTSMOUTH
OHIO
Toll Bridge
23
S. PORTSMOUTH
FULLERTON
MAYSVILLE
GREENUP
RUSSELL
ASHLAND
23
HUNTINGTON
WEST VIRGINIA
KENOVA
toll-bridge
CATLETTSBURG
BIG SANDY RIVER
KENTUCKY
KEY
PORTION GRANTED
PORTION OF ROUTE PROHIBITED
XXXX UNDER CONSTRUCTION
L.L. Marsh C.E. Sept 26, 1929

lumbus, Ohio, via South Portsmouth, Ky., and Huntington, Vest Va., starting from Huntington, West Va., extending down river over U. S. Federal Aid Road 23 through Russell, Ky., to and through Ironton, O., to U. S. Federal Aid Road 52 and continuing down river over said road 52 to U. S. Federal Aid Road 23 through Portsmouth, O., **across said new interstate toll bridge** on U. S. Federal Aid Road 23 to bus terminal at the Kentucky end of said bridge at South Portsmouth, Ky., and then north back across said **new interstate bridge** and continuing on U. S. Federal Aid Road 23 to Columbus, Ohio; then reverse and back to Huntington, West Va., over exactly the same federal aid roads and interstate toll bridges.

The **dotted line** shown on the blue print map from Columbus, O., through Portsmouth, O., to Ironton, O., **shows the part of the route granted by the Ohio commission. The heavy solid line between Portsmouth, Ohio, and South Portsmouth, Kentucky, and which for the most part coincides with the new interstate toll bridge, represents the part prohibited by the Ohio commission.** The dotted line from Huntington, West Va., to the West Virginia-Kentucky line at Kenova shows the part permitted by the State Road Commission of West Virginia, on April 13, 1928. (See Appendix, Plaintiff's "Exhibit M.") The dotted line from Catlettsburg, Ky., through Russell, Ky., to Ironton, O., and the solid heavy line from South Portsmouth, Ky., to Portsmouth, O., shows the part of the route permitted by the Kentucky department of motor transportation which was granted January

30, 1928, revoked April 2, 1928, revived April 3, 1928, and extended April 17, 1928, to April 25, 1928. (See Appendix, Plaintiff's Exhibits "J-1", "J-2", "J-3", "J-4", "J-5", "J-6", "J-7", "J-8", and "J-9.") It will be noted that the state road commission of West Virginia made its order certificating Grubb April 13, 1928, which was after March 13, 1928, on which last mentioned date the hearing was had and record made before the Ohio commission, which record as then made was the only record submitted by error proceedings to the Ohio Supreme Court. The Kentucky department of motor transportation by Permit No. 2204 (See Appendix, Plaintiff's "Exhibit J-3.") granted Grubb to engage in interstate service from the West Virginia-Kentucky line at Catlettsburg through Russell, Ky., to Ironton, O., and from South Portsmouth, Ky., to and through Portsmouth, O. This permit was granted January 30, 1928, and was revoked April 2, 1928; but Grubb did not know this until April 3, 1928, as shown by Plaintiff's Exhibits "J-7", "J-8", and "J-9", Appendix. It was extended to April 25, 1928. This Kentucky permit was not in the record made at the hearing March 13, 1928, nor was it in the record in the error proceedings in the Ohio Supreme Court.

The history of this Kentucky permit and the West Virginia permit is set forth in paragraph 13 of the bill of complaint as the same appears on pages 16 and 17 of appellees' printed record filed in support of the motion. The Public Utilities Commission of Ohio did not know of the Kentucky permit granting Grubb the right to cross

the Ohio river over the new interstate toll bridge from South Portsmouth, Ky., and return,—nor did said commission know of the grant made by West Virginia, for the reason that these new matters took place after the record was made before the Ohio commission on March 13, 1928. Nor did the commission know about the permit from Kentucky and the certificate from West Virginia before it issued its prohibitory order of April 2, 1928. It was the record made before April 2, 1928, and the prohibitory order made thereon that the Ohio Supreme Court had before it for revision in Grubb's error proceeding. Neither did Grubb know about these things, because the Kentucky and West Virginia authorities had not acted. The Ohio commission itself in its answer, filed in the District Court over one year after the case was brought in the District Court, at paragraph 13, as the same appears on page 55 of appellees' printed record in support of the motion, admits that it has no knowledge of the allegations set forth in paragraph 13 of said bill of complaint. The Ohio commission having no knowledge as it alleged, it must follow that the Ohio Supreme Court could have no knowledge, for the reason that it was the record made before this very commission that was submitted to the Ohio Supreme Court and none other.

APPELLANT DENIES THAT THIS APPEAL IS PROSECUTED FOR DELAY ONLY.

A few facts and dates as shown by the file marks on the pleadings and exhibits will show that appellant's prosecution has been affirmatively active from the beginning, and that delay, where there was delay was caused by appellees themselves.

On January 23, 1928, Grubb, **proposing to engage in interstate commerce exclusively**, applied to submit himself to Ohio uniform police regulations, pay taxes and carry insurance.

March 13, 1928, the Ohio commission granted his application as prayed for, effective **April 1, 1928.** On this day all appellees herein were competitor-protestants before the Ohio commission and insisted that there was no interstate public convenience and necessity, that Grubb was not applying in good faith, that he was bankrupt and that he was seeking the so-called certificate to force The Interstate Motor Transit Company, and The Cannonball Transportation Company, to buy him out. **On April 2, 1928**, the commission issued its formal order granting Grubb from Columbus through Portsmouth to Ironton, O., over U. S. Federal Aid Roads 23 and 52, but "**prohibited**" him from incorporating within the route granted the right to go to South Portsmouth, Ky., over the **new interstate bridge over the Ohio river** between Portsmouth, O., and South Portsmouth, Ky., on the ground, that on May 10, 1927, the protesting-competitor, The In-

terstate Motor Transit Company, a corporation, had a joint transfer and tariff arrangement with a Kentucky bus line that came from Kentucky by ferry, **there being no interstate bridge between Portsmouth and South Portsmouth at the time**, and on the further ground that Grubb on said **May 10, 1927**, was president and general manager of said corporation. This order of **April 2, 1928**, was to become effective **May 1, 1928.**

On April 6, 1928, Grubb applied to the Ohio commission to amend the prohibitory part of the order by making it effective April 18, 1928, and to make it read, "granted as prayed for", which was the order as announced **March 13, 1928**, the day of the hearing. The commission amended to make the order effective April 18, but refused to stand by its announced order of March 13, 1928. The Kentucky permit, which was not in evidence before the commission, was limited to 60 days from January 30, 1928, and on April 3, 1928, Grubb was advised by the Kentucky highway commissioner that the **entire Kentucky permit** had been revoked. (Appellant's Exhibits "J-6" and "J-7", Appendix.) Later the Kentucky commissioner revived the permit, extending it until April 25, 1928.

On **April 13, 1928**, West Virginia grants Grubb a certificate to **engage in interstate commerce exclusively.** These new facts as to what Kentucky and West Virginia did **were not in the record made before the Ohio commission March 13, 1928, and which record was later submitted to the Ohio Supreme Court.** On April 17, 1928, Grubb applied to the Ohio commission for a rehearing on

the ground that the prohibitory part of the order of April 2, 1928, was not in accordance with the announced order and decision made by the commission on March 13, 1928. The appellees failed and neglected to introduce in evidence in the District Court this application for rehearing. On April 19, 1928, the corporation-competitor-appellees filed their petition in error against the Ohio Public Utilities Commission in Case No. 21098, (119 O. S., p. 264) for an order of the Ohio Supreme Court reversing that part of the order of April 2, 1928, that granted Grubb from Columbus, O., via Portsmouth, O., to Ironton, O., over U. S. Federal Aid Roads 23 and 52. Grubb was not a party to this proceeding.

On March 31, 1928, the corporation-competitor-protestant-appellees brought an injunction suit against Grubb and the Ohio commission, and on April 7, 1928, served on him a notice that he appear before a notary in Judge Blair's office in Portsmouth, O., April 10, 1928, at 9 a. m. and bring all books and records and data of every kind and description. This suit in Scioto county has not been prosecuted by said appellees at all. These facts were not before the Ohio commission and were never submitted to the Ohio Supreme Court.

THE EQUITY SUIT IN THE UNITED STATES DISTRICT COURT No. 627.

On April 20, 1928, Grubb filed bill of complaint in United States District Court against the Ohio commission, the corporation-protestant-appellees and certain police officers, gave bond, and restraining order is

granted, restraining the commission and the corporation-appellees from arresting or interfering with Grubb in his exclusive interstate operation of a motor bus line from Columbus, O., via South Portsmouth, Ky., to Huntington, West Va., and return. On April 23, 1928, all appellees, excepting the commission are personally served with subpoena and restraining order. On April 25, 1928, the Public Utilities Comission of Ohio and each member thereof are served personally with subpoena and restraining order.

On May 10, 1928, Grubb, with consent of court and counsel, files amendment to bill of complaint. On April 20, 1928, entry granting temporary restraining order filed. (See pages 14 and 15 of transcript of record in clerk's office.) On May 3, 1928, corporation-appellee, The Interstate Motor Transit Company, files its first answer. On October 5, 1928, the district judge sets case for hearing on November 10, 1928.

Between May 10, 1928, and June 8, 1928, the restraining order is kept alive by the district judge, and on June 8, 1928, it is continued in force by entry of the district judge until case heard. On November 10, 1928, The Interstate Motor Transit Company files its amended answer. On November 10, 1928, The Ohio Valley Bus Company, The Portsmouth Public Service Company, and The Cannonball Transportation Company file their answers for the first time, being 4 months out of rule. The Public Utilities Commission of Ohio had filed no answer at all and was 4 months in default. The Ohio Valley Electric Railway filed an answer adopting that of The Ohio Val-

ley Bus Company, but its answer bears no file stamp. On May 7, 1928, in pursuance of deposition notice, appellant went to Frankfort, Ky., to take deposition of Kentucky highway commissioner. During the months of September and October, 1928, trips were made to Columbus, Huntington, and Portsmouth, taking testimony in pursuance of the order of the District Court. On November 10, 1928, a hearing was had before three-judge court, all testimony and exhibits filed, arguments made and the case fully and finally briefed and submitted. On this date the three-judge court took the case on the merits under advisement, the court holding the same without decision until May 18, 1929.

On May 13, 1929, the district judge without the knowledge or consent of appellant, allows the Public Utilities Commission of Ohio to file its answer, although it had been in default for over a year. (Federal Equity 12.) Appellant saved exception in the final entry, and in his assignment of errors at paragraph 17 and in his "statement of points" at point 3. In its answer the commission traverses the bill of complaint and amendment thereto, and by way of new matter sets up the plea of res adjudicata. On May 13, 1929, by leave of court, the corporation-appellees, file separate supplemental answers, setting up the plea of res adjudicata, although as to The Ohio Valley Bus Co., The Portsmouth Public Service Co., and The Ohio Valley Electric Railway Co., there could be no issue because they do not operate across the new interstate bridge to South Portsmouth, Ky., and never did. They had, as plaintiffs in error, joined with The Inter-

state Motor Transit Company, and The Cannonball Transportation Company, in the error proceeding against the commission to set aside the part of the order of April 2, 1928, that granted Grubb from Columbus, O., via Portsmouth, O., to Ironton, O., because as to the part granted they would be competitors of Grubb as to the part of his operation from Portsmouth via Ironton through Russell, Ky. They never were and could not be concerned by or with Grubb's operation over the new interstate bridge to South Portsmouth, Ky. The Interstate Motor Transit Company, and The Cannonball Transportation Company, operated over this new bridge between Portsmouth and South Portsmouth, to and from the bus station at the Kentucky end of said bridge in interstate commerce. In their case in the Ohio Supreme Court, No. 21098, (119 O. S., 264), both before the commission and the Ohio Supreme Court, they did raise the federal question of interstate commerce, but the Ohio Supreme Court said at page 267 that the commission was right,

> "In holding that the questions were federal in character, and must be passed on by the federal authorities, and that the jurisdiction of the commission was very limited and well defined by the decisions with respect to interstate carriers. The protestants outlined in a general way to the commission the character of evidence they wished to offer, and asked to be afforded time to prepare the same so it could be offered; but the commission held and ruled that such evidence would be irrelevant, immaterial, and incompetent for want of jurisdiction of the subject matter.
>
> The protestants then sought to make their case by cross examination of Grubb, covering the same features of the case. This the commission declined

to permit, for the same reasons." (See appellees' printed part of Record, pages 79 and 80.)

On May 18, 1929, the District Court, over the objection of appellant, exceptions saved and noted of record, as appears by the entry on page 246 of the transcript, allowed to be filed and introduced in evidence the mandate of the Ohio Supreme Court, which "affirms" the entire order of the commission of April 2, 1928, **"for the reasons stated in the opinion filed in this case."**

On May 18, 1929, the District Court, three judges sitting, refers to and cites the case in the Ohio Supreme Court as follows:

> "Grubb, etc., and The Interstate Motor Transit Company v. Public Utilities Commission of Ohio, 119 O. S., 264, and asks the question whether the disposition of the case by the Ohio Supreme Court is a bar in this court,—whether that court's judgment is res adjudicata or an estoppel in this court." (See appellees' printed part of Record, bottom page 87 and top of 88.)

At bottom of page 88, the three-judge court uses the following language:

> **"And, although that court in its opinion (119 O. S., 264) failed to deal with the illegality of the commission's action and findings in relation to the constitutional guarantees and limitations, yet the power and duty given it by the statute in such cases and the raising of that by the plaintiff in his pleadings, results in the conclusion that the Supreme Court passed upon all questions that were before it, and its judgment must be interpreted to include a finding that the acts and orders of the commission were such as to not invade the constitutional rights of the plaintiff Grubb."**

It will be noted that the District Court in its opinion expressly said that the Ohio Supreme Court,

> **"failed to deal with the illegality of the commission's action and findings in relation to the constitutional guarantees and limitations."**

It will further be noted that the Ohio Supreme Court in its mandate said that it,

> **"affirmed for the reasons stated in the opinion filed in this case."**

This mandate appears on pages 83 and 84 of appellees' printed part of the record.

On November 14, 1928, the Ohio Supreme Court made its decision, but the appellees, each and all of them delayed and delayed for 6 long months, to wit: from November 14, 1928, until May 13, 1929, before attempting to raise the plea of res adjudicata. Grubb's equity suit in the District Court had been fully and finally heard, argued and briefed, and submitted for decision November 10, 1928, and the three-judge court held it without decision until May 18, 1929, more than 6 long months. In this manner the appellant was kept in suspense, and the District Court by thus allowing the Public Utilities Commission to file its answer more than a year out of rule and the other appellees to file their supplemental answers more than 6 months out of rule, appellant Grubb, if we assume that the state court had decided the federal question, was, by the running of the time, prevented from taking a direct appeal from the state court

to the Federal Supreme Court. **But the District Court said May 18, 1929, that the state court,**

> **"failed to deal with the illegality of the commission's action and findings in relation to the constitutional guarantees and limitations",**

and we for the appellant say that we too had noted that the state court, "failed to deal with the illegality of the commission's action and findings in relation to the constitutional guarantees and limitations", and for that reason we felt that the decision of the state court could not become res adjudicata in the District Court. The state court having failed to deal with the questions of constitutional guarantees and limitations, there was no reviewable federal question or questions for review by the Supreme Court of the United States.

> Union Pac. Ry. Co. v. Laughlin, 247 U. S., 204;
> New Orleans Taxpayers Protective Assn. v. Sewerage & Water Board of New Orleans, 237 U. S., 33.

The reviewable character of the decision of the state court and what was drawn in question and decided is ascertained not only from its judgment but from its opinion.

> Burbank v. Ernst, 232 U. S., 162.

The opinion of the state court may be regarded and considered by the federal Supreme Court as a part of the state record.

> New York, ex rel., Bryant v. Zimmerman, et al., 278 U. S., 63.

On June 19, 1929, the entry dismissing the bill and amendment to bill was filed.

On July 10, 1929, all appeal papers including assignment of errors and prayer for reversal and order allowing appeal and fixing bond was filed.

On July 30, 1929, bond on appeal was filed.

On July 30, 1929, appellees finally got back to counsel for appellant the citation on appeal, they having held the same for twenty days.

Counsel were so widely distributed that they could not be gotten together to arrange the testimony in narrative form, the entire burden falling upon counsel for appellant. Carbon copies of the narrative were immediately mailed to counsel for appellees. When the narrative was finished, the time for preparing which having been enlarged by the district judge, counsel for appellees desired revisions and changes. Counsel for appellant immediately made all such changes and even made for appellees a complete carbon copy of the transcript and sent same to them, thereby saving them trips to Columbus and the time of the district judge in working out conflicts.

On November 25, 1929, the entire transcript, praecipe, points and designations of appellant, designations of appellees, all appeal papers, including the assignment of errors and prayer for reversal, and the original citation, were filed with the clerk of the Supreme Court of the United States.

On December 4, 1929, appellant's printed "statement as to the jurisdiction," showing full service, was filed with the clerk of the Supreme Court of the United States.

The clerk has been over the joint designations of appellant and appellees for the printed record, has estimated the cost, part of which appellees by stipulation in the transcript promised to pay, appellees have been advised as to their portion and have been asked to send the same, and this was the condition of affairs at the time the motion was filed to dismiss charging appellant with delay.

We have until February 3, 1930, seventy days from November 25, 1929, within which to get the deposit to the clerk of the Supreme Court of the United States to pay clerk costs and the expense of printing the record in accordance with the designations of appellant and appellees.

GRUBB'S CASE IN THE SUPREME COURT OF OHIO, No. 21184.

On May 31, 1928, forty-five days after federal jurisdiction had fully attached in Grubb's equity suit in the United States District Court, Southern District of Ohio, Eastern Division, Grubb filed a petition in error against the Public Utilities Commission of Ohio. There were no other parties to this case. Grubb sought to have the state court revise the prohibitory part of the order of April 2, 1928, so that it would agree with the announced order and decision of the commission made March 13, 1928, by which announcement the commission granted Grubb the right to engage in interstate service from Columbus, O., via South Portsmouth, Ky., to Huntington, West Va., and return, over U. S. Federal Aid Roads Nos. 23 and 52.

In said petition in error he further advised the state court of having been granted the right to engage in interstate commerce by the Kentucky highway commissioner from South Portsmouth, Ky., to Portsmouth, O. He did not advise the court as to the certificate from West Virginia, which, with the Kentucky permit, he could carry passengers from Huntington, West Va., to South Portsmouth, Ky., and reverse, over said new interstate bridge. The matter of the Kentucky permit as revived and the West Virginia permit as granted, both being after April 2, 1928, the date he was granted in part and prohibited in part by the Ohio commission, were not in the record made before the Ohio commission March 13, 1928, and therefore were not grounds in the application for a rehearing. Not being in the application for a rehearing they could not be urged as grounds of error in Grubb's petition in error filed in the state court May 31, 1928. Ohio General Code, Section 543, found on page 67 of appellees' printed part of the record, amongst other things provides as follows:

> "No corporation or person shall in any court urge or rely on any ground not set forth in said application for a rehearing."

This was the reason why the District Court in its decision said that the state court

> "failed to deal with the illegality of the commission's action and findings in relation to the constitutional guarantees and limitations."

This is further borne out by the confession of the commission in its answer at paragraph 13 on page 55 of ap-

pellees' printed part of the record, at which paragraph the commission says that it has no knowledge of the Kentucky permit or the West Virginia permit.

Paragraph 6 of Grubb's petition in error, as set forth on page 6 of appellees' brief on the motion to dismiss or affirm, **is completely omitted.** Why appellees omitted this paragraph 6 counsel for appellant cannot explain. In the answer of the Public Utilities Commission appearing on page 58 of appellees' printed part of the record, paragraph 6 of Grubb's petition in error, reads as follows:

> "6. That said part of the order is a violation of and contrary to Section 614-101 of the General Code of Ohio."

Section 614-101 appearing in the appendix as "Plaintiff's Exhibit A-1," reads as follows:

> **"Section 614-101. Neither Section 614-84 to 614-102, inclusive, of the General Code, nor any provisions thereof, shall apply or be construed to apply to commerce with foreign nations or countries, or among the several states of this Union, except in so far as the same may be permitted under the provisions of the Constitution of the United States and the acts of congress."**

Section 614-84 to 614-102 comprehends the motor transportation code of the state of Ohio.

> Clark, et al. v. Poor, et al., Public Utilities Commission of Ohio, 274 U. S., pp. 554, 556, and particularly p. 558.

> "The motor transportation act of Ohio • • • Sections 614-2 to 614-102 both included of the General Code of Ohio, provide that the defendants

* * * as Public Utilities Commission of Ohio have jurisdiction to determine the public convenience and necessity for intrastate operation, but no authority to determine these questions in reference to interstate commerce."

Red Ball Transit Co. v. Marshall, et al., 8 Fed. (2nd), 635-638;

Magnuson v. Kelly, Comr., 35 Fed. (2nd), 867. (Fed. Reporter advance sheets of January 6, 1930.)

"The Ohio motor transportation act does not authorize the Public Utilities Commission to exclude transportation companies operating in interstate traffic from the highways of the state."

Cannon Ball Transportation Co. v. Ohio Public Utilities Commission, 113 O. S., 565 (Syl. 7).

The Ohio motor transportation act went into effect July 28, 1923. Before that time there were no state regulations of intrastate motor common carriers. By said act (Sections 614-2, 614-2a and 614-84 to 614-102 of the Ohio General Code) motor bus and motor truck intrastate common carriers were declared to be public utilities and placed under the regulation of the Ohio Public Utilities Commission. Such intrastate carriers were and are required to secure certificates of public convenience and necessity from the commission before beginning to operate. By the express language of Section 614-101, which is a part of the Ohio motor transportation act, it is provided that the entire act **shall not apply nor be construed to apply to commerce among the states of this Union.**

The procedure for reviewing an order of the commission affecting an intrastate "motor transportation com-

pany," as defined by the act at Section 614-84 (a) (see appendix) it is provided at Section 614-89 (see appendix), which section reads as follows:

> "Sec. 614-89. In all respects in which the Public Utilities Commission has power or authority under this act applications and complaints may be made and filed with such commission, processes issued, hearings held, opinions, orders and decisions made and filed, petitions for rehearings filed and acted upon, and all proceedings before the Supreme Court of this state considered and disposed of by **such court in the manner, under the conditions and subject to the limitations and with the effect specified in the sections of the General Code governing the supervision of other public utilities by the commission.**"

The court's attention is called to the following from said Section 614-89,

> "all proceedings before the Supreme Court of this state shall be considered and disposed of by such court **in the manner, under the conditions and subject to the limitations and with the effect specified in the sections of the General Code governing the supervision of other public utilities by the commission.**"

Such proceedings before the Supreme Court of Ohio shall be considered and disposed of by said court, **but only in the manner, and under the conditions and subject to the limitations and with the effect specified in Sections 614-2 and 614-2a, which sections define public utilities and railroads** (see appendix),—the latter Section 614-2a covers the entire public utility code (Sections 487 to 614-102, both inclusive) known as "Chapter 1, Division 2, Title 3, Part First of the General Code, and the acts amendatory and supplemental thereto or in this act."

This Section 614-2a expressly mentions **Section 502** of the General Code of Ohio (see appendix), **which Section 502** in part follows:

> "This chapter **shall apply to the transportation of passengers and property between points within this state,** * * * in addition thereto the provisions of this act shall apply to the regulation of any and all other duties, services, practices and charges, * * * **which are proper subjects of regulation, excepting only, that they shall not apply to the regulation of commerce with foreign nations, and among the several states, and with the Indian tribes.**"

This Section 502 has been construed when it was a part of what was then known as the railroad commission act, as follows:

> "The legislative intention, which is expressed in this section, underlies the entire act and **limits its scope to intrastate commerce as distinguished from interstate commerce.**"
>
> Railroad Commission v. Railway, 12 O. C. C. (N. S.), 317, 21 O. C. D., 337 (affirmed 83 O. S., 476).

This Section 502, G. C., was known as Section 2 of the original act. **Section 544, G. C.**, which appellees print on page 68 of their printed part of the record, was Section 33 of the original act and was enacted by the Ohio general assembly at the same time as was original Section 2 now known as Section 502, G. C. By the express provision of Section 502, G. C., just quoted, which says the **entire chapter** shall not apply to interstate commerce, and Section 544, G. C., being a part of the same act and the **same chapter**, having in mind said Section 614-89, G. C., which provides that the proceedings before the Supreme

Court shall be "**subject to the conditions and limitations**" specified in the sections of the General Code governing the supervision of other public utilities by the commission, and further having in mind Section 614-101, G. C., which provides that interstate motor transportation common carriers shall not be subject to the provisions of the motor transportation code (Sections 614-84 to 614-102), it must follow, as "the night the day," that Section 544, G. C., has no application, either substantively or procedurally to the interstate commerce of an interstate motor common carrier, whether proposing to operate interstate, or actually operating interstate with motor bus or motor truck.

This being so, as it certainly is, there are absolutely no statutory law provisions that an interstate motor common carrier may or can invoke in order to secure a hearing before the Public Utilities Commission of Ohio or the Supreme Court of Ohio, where the subject-matter of the hearing, either before the commission or the court, is **interstate commerce.** Such subject-matter being **expressly excluded from state scope, jurisdiction and discretion by the express provisions of Ohio statutory law.**

The state court decision in the Grubb case must have been based upon a local state question, for the reason that the interstate commerce question between Ohio and Kentucky at South Portsmouth was entirely outside the scope of state power and discretion. A recent decision of the Ohio Supreme Court shows conclusively that interstate commerce is not within the jurisdiction of the commission or the court, even though the applicant was also engaged in intrastate commerce.

A corporation interstate and intrastate motor bus line applied to the commission for authority to issue stock. The commission dismissed the application in the following words:

> "It is therefore ordered, that, for want of jurisdiction, said application be, and hereby the same is dismissed."

The applicant was an Ohio public utility to the extent of its intrastate certificated operation and thereby was able to get into the Supreme Court.

The court said that the Ohio statutes as to stock issues were not applicable as to the exclusive interstate commerce business and service. That both it and the commission were without jurisdiction of the subject-matter. The court further said (Great Lakes Stages v. Ohio Public Utilities Commission 120 O. S., p. 491) on page 498:

> "**The very gist of jurisdiction** is the power to compel parties to come before the court or body which has the jurisdiction. Control and obligatory authority are the essence of jurisdictional power. This jurisdiction must be conferred by law, **and cannot under any circumstances be conferred by the consent of the parties.**"
>
> 7 Ruling Case Law, Sec. 76, page 1043.

Numerous cases are cited.

On page 499 that court said:

> "Since the Public Utilities Commission can not compel the plaintiff in error to apply to it for authority to issue this stock, it can not be forced by a voluntary application to authorize the same. We agree that the commission has no jurisdiction."

Appellant urges the same doctrine in his assignment of errors and in his "statement of points, Nos. 2, 4, 5, 6, 8, 9, and 11" (see appendix).

By the express provision of the Constitution of the state of Ohio, Section 2, Article IV (see appendix, Plaintiff's Exhibit "A-2"), it is provided that the Supreme Court of Ohio,

> "shall have such **revisory jurisdiction** of the proceedings of administrative officers as may be conferred by law."

"Administrative officers" may be understood to mean "Public Utilities Commission of Ohio."

> Gas Light Company v. Public Utilities Commission, 229 Federal, 670.

> "The powers of the Public Utilities Commission are conferred by statute and it possesses no authority other than that thus vested in it."
>
> Cincinnati v. Public Utilities Commission, 96 O. S., 270;
>
> Sylvania Telephone Co. v. Commission, 97 O. S., 202, 207.

Numerous other Ohio authorities to the same effect may be cited.

We must conclude that both the jurisdiction and power of the Ohio Public Utilities Commission and that of the Ohio Supreme Court as to the orders of the commission is only such as is expressly conferred by law. If the decision and judgment can be interpreted to be a decision and judgment, in the light of the foregoing authorities, then the judgment is absolutely null and void. A void judg-

ment of any court cannot be and never can become res adjudicata in any other court.

"Where a judgment is void for want of jurisdiction of the subject matter or of the person of defendant, it is of no effect whatever as an estoppel, does not merge the cause of action, and constitutes no bar to further litigation upon the same cause of action."

Jasper Bank v. Rome First Nat. Bank, 258 U. S., 112;
34 Corpus Juris, 768.

"No conclusive effect can be given to a judgment which is absolutely void, whether its invalidity results from a want of jurisdiction over the parties, or over the subject matter of the controversy."

Robertson v. Gordon, 226 U. S., 311;
Central Railroad Co. v. Jersey City, 199 Fed., 237;
Parr v. United States, 153 Fed., 462.

An examination of that part of the decision and opinion of the Ohio Supreme Court made in the case in which Grubb, d. b. as The Tri-State Transit Company, and the Public Utilities Commission were the only parties, shows that the only question considered by the court was a question of evidence. The record made March 13, 1928, in the informal, non-statutory and ex-parte hearing before the commission, shows that Grubb, proposing to engage in interstate commerce exclusively, applied to submit himself to the uniform police regulations and laws of Ohio and pay taxes for the use of the highways of Ohio, and the bill of complaint in the District Court so shows, and all this is admitted by the answers to the bill. The bill was filed and federal jurisdiction attached April 20,

1928, and was complete by April 25, 1928, when the commission was served personally by the marshal. Grubb, under trade-name of The Tri-State Transit Company, actually began doing business April 25, 1928, not before this date. On May 31, 1928, Grubb, doing business as The Tri-State Transit Company, filed the petition in error in said Ohio Supreme Court and brought before it the order, "**granted as prayed for,**" made March 13, 1928, and the part of the order that prohibited him from moving his busses to South Portsmouth, Ky. The part of the order of April 2, 1928, so prohibiting, reads:

> "**Ordered**, that said applicant **be, and hereby he is prohibited from incorporating** within the regular route upon which he will herein be granted a certificate to operate within the state of Ohio, **any movement which shall provide for the crossing and recrossing of the Ohio river at Portsmouth, Ohio.**"

Nothing is said about the new interstate toll bridge that had been newly built and for the first time opened for traffic in September, 1927. Nothing said about South Portsmouth, Ohio, **and nothing said about interstate commerce.** It is plain that the commission well knew it was only dealing with uniform police regulations. In other words the **only subject matter** before the commission **was Ohio police regulations and laws and the payment of taxes.** Grubb testified that he would obey the laws and pay taxes. In his application Grubb described his route over U. S. Federal Aid Roads 23 and 52 via South Ports-

mouth, Ky. On March 13, 1928, the day of the hearing, the commission announced:

> "The order is made on the record before us. **We grant him a certificate to engage in interstate service, as prayed for,** effective the first of April."

This certainly meant over the route set forth in the application for the reason that it was this route that was "**prayed for.**" This **was inconsistent** with the order of April 2, 1928, which "**prohibited any movement which shall provide for the crossing and recrossing the Ohio river at Portsmouth, Ohio.**" The Ohio Constitution providing that the Supreme Court shall have "**such revisory jurisdiction**" as may be **conferred by law** of the "**proceedings**" of administrative officers, and Section 544, G. C., providing that **revisory jurisdiction shall mean**, to wit: **reverse, vacate** or **modify** (not "**affirm,**" the word "**affirm**" not being in the Section No. 544 at all), Grubb, d. b. a., etc., applied to the court to have it "**revise**" the "**prohibition**" and **modify** it, so that it would be consistent with the "granted as prayed for" order of March 13, 1928. The jurisdiction of the Ohio Supreme Court **is not appellate** in these kinds of cases, it is "**such revisory jurisdiction as may be conferred by law,**" as the Ohio Constitution reads. The proceeding before the commission **was not adversary.** The protestants tried to make it such, but the **commission stopped them.** They outlined the evidence they expected to introduce, but the commission would not let them, saying the questions were federal in character and would have to be passed on by the federal authorities. (See opinion, Oh. Sup. Ct., ap-

pellee's printed record, page 79.) There were no pleadings and it is admitted on all sides that Grubb agreed to obey and comply with Ohio laws and pay taxes. The District Court, as appears from its opinion (page 86, appellee's printed part of the record), could not definitely tell what the prohibition meant. There was no evidence before the commission that The Interstate Motor Transit Company, the corporation, was operating busses across the Ohio river, either by bridge or ferry. There was nothing said about Grubb proposing to cross the river by ferry or new bridge. Grubb said he intended to go to South Portsmouth, but would carry no passengers whose complete ride would be between Portsmouth, O., and South Portsmouth, Ky., because there were other local bus and taxi lines that took care of that. From the record the Ohio Supreme Court could not tell whether The Interstate Motor Transit Company and The Cannon Ball Transportation Company, were corporations or not. The court evidently assumed that they were either partnerships or just trade names, for the court said that the commission had the right to examine its records and find from them what Grubb had done under certificates previously issued to him and after such examination and investigation, and finding bad conduct in operation, make such order as would prevent such bad conduct again. The record in the District Court shows and it is admitted that Grubb never had a certificate or permit issued to him of any kind, and that The Interstate Motor Transit Company and The Cannon Ball Transportation Company were corporations, that on May 10, 1927 (see order of April 2,

1928, appellee's printed part of record, page 71), the corporation, The Interstate Motor Transit Company, was the only defendant that had a certificate, and that it was it that had been guilty of subterfuge, while Grubb was president and general manager. **But Grubb continued in both positions with said corporation, and after the bridge was opened for traffic to South Portsmouth, Ky., it applied to the same Ohio commission to go to South Portsmouth, Ky., over the new bridge and turn right around at the Kentucky end of it and return at once to Ohio, and was actually granted the right and certificate so to do by amendment to its original certificate by the Ohio Public Utilities Commission on September 21, 1927.** (See appendix, appellant's brief, Plaintiff's Exhibit "O.") None of this was in the record made before the commission at the hearing on March 13, 1928.

An intrastate certificate of public convenience and necessity is a mere personal license.

Westhoven v. The Comm., 112 O. S., 411.
Estabrook v. The Comm., 112 O. S., 417.

There is no such thing as an interstate certificate of public convenience and necessity.

Clark v. Poor, et al., 274 U. S., p. 554.
Interstate Busses Corp. v. Holyoke St. Ry., 273 U. S., p. 45.

By turning to the part of the opinion and syllabus of the decision and opinion of the Ohio Supreme Court, in so far as the same applies to Grubb, it will appear that there were two proceedings in error, and that the deci-

sion is based as to Grubb, solely, in so far as it refused to revise the order, on the assumption that Grubb had operated under certificates previously granted to him personally, and that he had proposed to the Ohio commission to operate in intrastate commerce.

The following summary as to Grubb's Ohio court case shows that the question was purely a state question as distinguished from a federal question, and that the decision was based on state law and not federal law:

(1) The Supreme Court did not have power to "affirm."

(2) The proceedings before the commission were not adversary.

(3) The court assumed that Grubb had previously operated under certificates issued to him, which was not the fact, but the court arrived at this conclusion because there was no evidence to show that The Interstate Motor Transit Company and The Cannon Ball Transportation Company were and had been from the first corporations. Protestants before commission introduced no evidence.

(4) The court did not know, because not in the record, being not material where applicant proposes to **engage in interstate commerce exclusively**, that the commission on September 21, 1927, after new bridge opened, had, while Grubb was president and general manager of The Interstate Motor Transit Company, granted said corporation the right to engage in interstate commerce to and from South Portsmouth, Ky., over said new bridge, and had thereby forgiven said corporation and Grubb too for that matter, for what it had been found guilty of in May, 1927. (See Plaintiff's Exhibit "O," appendix.)

(5) If the Ohio court did not ground its judgment on questions of state law, but did ground it on the question of interstate commerce, then it attempted to **exercise jurisdiction entirely outside the scope of state power,** and the judgment in such case, is **absolutely void.** The federal jurisdiction to regulate **exclusively interstate commerce motor common carriers, since congress has not legislated as to such carriers, is exclusive of all state power of the kind, such power being reserved by the commerce clause for federal regulation.**

Buck v. Kuykendall, etc., 267 U. S., 307.
Bush & Sons v. Maloy, et al., 267 U. S., 317, and 325.
Interstate Busses Corp. v. Holyoke St. Ry., 273 U. S., 45.
Sprout v. City of South Bend, 277 U. S., 163.
Magnuson v. Kelly, Commr., 35 Fed. (2nd), 867. (Fed. Reporter of Jan. 6, 1930.)
Atlantic & Pacific Stages, Inc. v. Stahl, et al., U. S. Dist. Ct., Western District of Mo., decided Nov. 20, 1929, reported in United States Daily of Dec. 7, 1929, page 6; Yearly Index, page 2646.
Clark v. Poor, et al., 274 U. S., 554.
Red Ball v. Marshall, et al., 8 Fed. (2nd), 635.
Hi-Ball Transit Co. v. Rd. Comm., 27 Fed. (2nd), 425.
New Orleans v. New Orl. Water Works Co., 142 U. S., 79.
Harrison v. Morton, 171 U. S., 38 and 39.

THE REASON FOR PROHIBITING GRUBB AS SET FORTH IN THE ORDER OF APRIL 2, 1928.

The court's attention is called to pages 71, 72 and 73 of appellee's printed part of the record. This order of April 2, 1928, cites a case against The Interstate Motor Transit Company, a corporation, **an exclusive interstate motor bus common carrier.** That case was decided May 10, 1927. Grubb was not a party in that case. **This was before the new interstate toll bridge was built connecting Portsmouth, Ohio, with South Portsmouth, Ky.** Ferries were the only means of crossing the Ohio river generally used by the public at that time. The corporation, The Interstate Motor Transit, is now and has all along been operating to Kentucky end of bridge.

The record made before the commission on March 13, 1928, did not show that the commission had granted The Interstate Motor Transit Company the right to go across this new bridge on September 21, 1927, for the reason that Grubb's proceeding was non-statutory, there were no defensive pleadings, was not, in law, adversary and the protestants introduced no evidence. (Appellee's printed part of record, top page 80.) Grubb was willing to obey all applicable Ohio laws and pay taxes. There was no issue. The subject-matter of police regulations were to be obeyed and Grubb told where he lived and said he proposed to engage in **interstate commerce exclusively.** The matter of interstate commerce was excluded by the express words of Ohio statutes, Sections Nos. 502 and

614-101, and the numerous decisions of the United States Supreme Court. So the state court said to the corporation-protestant-plaintiffs in error in their case (119 O. S., 264) (appellee's printed part of the record, page 79) that the commission was right in holding that the questions were federal in character and must be passed on by the federal authorities. So it is plain that the commission kept from the Supreme Court of Ohio the order of September 21, 1927, where it granted The Interstate Motor Transit Company, even while Grubb was president and general manager, the right to cross to South Portsmouth and come right back. (See appellee's printed part of record, bill of complaint, para. 15; Comm. Ans., para. 15.) In the light of the foregoing, and in the light of the events that occurred after April 2, 1928, such as the Kentucky and West Virginia permits, all of which and many other facts are in the record in the District Court, but were not in the record in the state court, the part of the Ohio decision refusing to revise and clarify the prohibitory part of the order of April 2, 1928, so as to conform with the order, "granted as prayed for," of March 13, 1928, can only be understood as being based on purely state law.

> "To make a case reviewable by the Supreme Court from the highest court of a state, it must affirmatively appear on the face of the record that a federal question within the scope of state power was presented, and expressly or necessarily decided by such state court."
>
> Whitney v. The People, 274 U. S., 360.
> Herkness v. Irion, 278 U. S., top page 94.

WHAT DO THE WORDS, "WE GRANT HIM A CERTIFICATE TO ENGAGE IN INTERSTATE SERVICE, AS PRAYED FOR" MEAN?

On March 13, 1928, the commission announced and wrote on the file, and the stenographer took it down, "We grant him a certificate to engage in **interstate service, as prayed for.**" On April 2, 1928, the commission made a written order prohibiting movement across and reacross the new interstate bridge at Portsmouth, Ohio, but did not mention or use the words "interstate service" at all in the prohibition of April 2, 1928. The state court relied on the written order of April 2, 1928, which did not say anything about "**interstate service**" in the prohibitory part. So again it is plain, in view of the assertion of Section 614-101 in Grubb's petition in error, that the state court paid no attention to interstate commerce at all, or "**interstate service**" at all. It was only thinking about intrastate service. But Grubb had never had a certificate issued to him, and he had not yet begun to operate in interstate commerce exclusively—he informed the commission that he proposed to do so, but while doing so he would obey Ohio laws and pay taxes. The interstate commerce question was therefore not in any sense the subject-matter either before the commission or the state court. Therefore there could be no judgment as to such federal question. The state court disclaimed deciding the federal question, and the District Court so

found, for it said (appellee's printed part of the record, pages 88-89):

> "The state court in its opinion (119 O. S., 264) failed to deal with the illegality of the commission's action and findings in relation to the constitutional guarantees and limitations."

The District Court misapplied Section 544, G. C., for the reason that this section is applicable only when the motor carrier is engaged in intrastate service, unless congress has by statute made the jurisdiction concurrent. But congress has not done this as to exclusively interstate motor carriers. (See Buck and Bush cases, supra.) The District Court cited Hocking Valley Ry. Co. v. The Commission, 100 O. S., 321. An examination of this case shows that it concerned a purely intrastate service all within the state of Ohio. Again the District Court cited Chicago, Rock Island & Pac. Ry. Co. v. Schendel, Admr., 270 U. S., 611. This case is not in point at all, for congress by the Federal Liability Act has made state and federal jurisdiction in cases under it concurrent. The question in this case invoked the "full faith and credit clause" and its application, and was concerned with two state judgments of Iowa and Minnesota.

The foregoing analysis of the decision and opinion of the Ohio Supreme Court shows conclusively that it did not deal with or decide any federal question whatsoever, and neither it nor the commission had the jurisdiction or power so to do.

NEW FACTS OCCURRING AFTER THE RECORD WAS MADE BEFORE THE COMMISSION, MARCH 13, 1928.

Kentucky permit extended to April 25, 1928.

Grubb and the Ohio commission sued by corporation-competitor-protestants.

West Virginia grants Grubb interstate certificate April 13, 1928.

Grubb pays Ohio taxes April 23, 1928, and Ohio accepts the same. (See appendix.)

Grubb becomes an actual interstate operator April 25, 1928.

April 20, 1928, Grubb sues in United States District Court, gives bond, subpoenas and restraining order granted and allowed to issue.

April 23, 1928, all defendants, including corporation-competitor-appellees, are served personally, excepting the commission and its members.

April 25, 1928, the Public Utilities Commission of Ohio and each of its members are personally served with notice, subpoenas and restraining order.

In his bill of complaint at paragraph 15, Grubb charges discrimination against his interstate commerce across the new interstate toll bridge, in that the commission denied and prohibited him April 2, 1928, while it granted The Interstate Motor Transit Company, a corporation, a competitor, September 21, 1927, the right to engage in interstate commerce across and reacross this same inter-

state toll bridge, and that said corporation is still so operating. Over a year later the commission files its answer and at paragraph 15 thereof, it avers, in substance, that even though it had so granted The Interstate Motor Transit Company, that by so doing it did not violate the Fourteenth Amendment, Section 1.

DISCRIMINATION AGAINST INTERSTATE COMMERCE.

Early in September, 1927, the new interstate bridge between South Portsmouth, Ky., and Portsmouth, Ohio, was completed. On July 29, 1927, and August 1, 1927, The Interstate Motor Transit Company and the Ohio commission exchange letters relative to the former applying to get certificate or amendment thereto to cross and recross the new interstate bridge aforesaid. On September 21, 1927, the commission makes the order and grant whereby the corporation-competitor, The Interstate Motor Transit Company (Grubb then president and general manager) is certificated to go across said new interstate bridge to the Kentucky end of said bridge to a bus terminal, called all along there South Portsmouth, and turn around and come back and connect with its route at intersection of U. S. Federal Aid Roads 23 and 52 in Portsmouth, Ohio, which intersection is also known as Second street at the north end of said bridge. (See appendix to this brief, Plaintiff's Exhibits 12 and 13, and Plaintiff's Exhibit "O.")

The answer of The Interstate Motor Transit Company at its para. 15 (appellee's printed part of record, page

38), admits that it is still so operating, but denies that the commission's order of September 21, 1927, is in conflict with the Fourteenth Amendment.

(In the appendix of this brief and record, are two photographs of the bridge and the Kentucky shore; one, Defendant's Exhibit "B," shows the shore up-river towards Fullerton, Ky.; the other, Defendant's Exhibit "C," shows the Kentucky shore down-river towards the C. & O. Rd. depot at South Portsmouth. These photos do not show Fullerton and South Portsmouth proper. The building just west of the Kentucky end of the bridge, just above the two freight cars on Defendant's Exhibit "C," is the Union bus terminal. It is to this terminal that The Interstate Motor Transit, The Cannon Ball Transportation, and Grubb's busses, run. These photographs, taken in connection with the blue print herein, will show the highway, the location of Fullerton and South Portsmouth, and U. S. Federal Aid Road No. 23 on the Kentucky side. Between Fullerton and Greenup it is under construction and impassable, so it is plain that Grubb could not have applied to go to Huntington on the Kentucky side from South Portsmouth.)

Grubb's route was over this bridge to said bus terminal, operating as The Tri-State Transit Company, and return, is exactly the same as that of The Interstate Motor Transit Company.

Grubb contends in said para. 15 of his bill that such discrimination violates his rights to the equal protection of the laws and is contrary to the Fourteenth Amendment, Federal Constitution.

Counsel for appellant know that appellees have tried to confine their motion to dismiss or affirm to paragraphs 1, 2, 3, 4, 5, 7, 8, 9 and 10 of the bill. They do this because they do not desire the court to learn that in this case there is a very vital question of interstate commerce concerning an interstate commerce motor carrier in such commerce exclusively, and they desire to evade the effect of the decisions of court in the Buck, Bush, Intercity Busses Corp., Sprout and Clark-Poor cases. We insist on the consideration of this exclusive interstate commerce question and the discrimination question. These questions are made in paragraphs 11, 12, 13, 14, 15, 16, 17 and 18 of the bill, pages of appellee's printed part of the record, 14, 15, 16, 17, 18, 19, 20, 21 and 22. We also insist on our amendment to the bill, para. 6, on pages 24 and 25 of the same record. We further insist that the decision of the motion to dismiss or affirm does not at all depend on the few paragraphs appellees cite. It would be unjust and unfair to consider a part only of the bill in any case, and we feel that this court will consider the entire bill amendment thereto and the other exhibits.

This question of discrimination against interstate commerce is unlawful, regardless what boundary line of Ohio may be crossed in the operation of an interstate bus line, whether east, west, north or south. In this case, however, it is especially glaring. The Interstate Motor Transit Company, a corporation, is a direct competitor, and has been from the first, and has insisted that because it is such a competitor in the interstate carriage of passengers, that if Grubb is permitted to operate over the

bridge, he will take some of its passengers. If this is not so, then why is it in the case at all? What other interest could it have? If there are no passengers to be carried in interstate commerce back and forth over this bridge to points in Ohio and West Virginia and back, then it can suffer no injury, and it is out of the case as a non-interested party. No damage can be done it unless there is interstate commerce passengers to be carried, and if there are none, then it should stop using the bridge and should have stopped long ago. The fact of its very presence in this case, and also the fact of the presence in this case of The Cannon Ball Transportation Company, as interested parties, is proof positive that there exists and has existed interstate commerce passengers over this new bridge. Why did the Interstate Motor Transit apply to amend its certificate and get it September 21, 1927, if it were not for the passengers traveling interstate? The fact of this grant proves that it did so to carry the interstate passengers that it knew were there. Why build this beautiful bridge unless there was a demand for it? Why a toll bridge unless there were people to pay the toll? The picture of the bridge given facing page 67 of appellees' printed part of the record, proves that there exists people on the Ohio as well as the Kentucky side to use it, otherwise it would not have been built. The photographs in the appendix hereto show autos and people on the bridge.

INTERSTATE COMMERCE DISCRIMINATION CONTINUED.

Appellees in their brief on page 15 try to make it appear that there is no interstate commerce by motor bus across the new interstate toll bridge between Ohio and Kentucky at Portsmouth, Ohio. They cite to support their theory Inter-City Coach Co. v. Atwood, et al., 21 Fed. Rep. (2nd), 83. They have not examined this case. There was no great new $1,000,000 interstate toll bridge between Rhode Island and Massachusetts where the coach company crossed. The coach company had been and was operating intrastate and sought to extend its intrastate line and was denied; then, to avoid the effect of the Rhode Island officials, the coach company, without applying at all and agreeing to submit itself to Rhode Island laws and pay taxes, and without going to Massachusetts at all, deliberately began to operate in competition with a carrier along which it had previously sought to extend and was denied. In pursuance of its plan and ignoring the authority of both states in the matter of police regulations and payment of taxes, it ran its busses just over the line into Massachusetts and did not even have a stopping place or terminal. In view of such a set of facts there was no other decision for the District Court than the one it did make. There was no other competitor of the coach line in interstate operation that was doing what the coach line was doing. So the case is not at all in point. How different is Grubb's case. His case was like Buck's case, 267 U. S., 307.

Like Buck, Grubb had obtained from Kentucky the permit prescribed by its laws. This permit allowed Grubb as The Tri-State Transit Company to use this very bridge from South Portsmouth to Portsmouth and other points on his interstate route. (See appendix.)

This court said on page 316 of the Buck case:

> **"The vice of the legislation is dramatically exposed by the fact that the state of Oregon had issued its certificate which may be deemed equivalent to a legislative declaration that, despite existing facilities, the public convenience and necessity required the establishment by Buck of the auto stage line."**

By substituting "Grubb" for "Buck" and "Kentucky" for "Oregon", the vice of the order of the Ohio commission prohibiting him, **"is dramatically exposed."** It would then read:

> "The vice of the legislation is dramatically exposed by the fact that the state of Kentucky had issued its **permit which may be deemed equivalent to a legislative declaration that, despite existing facilities (The Interstate Motor Transit Company and The Cannon Ball Transportation Company, appellees herein), the public convenience and necessity required the establishment by Grubb of his exclusively interstate motor bus line."**

The Ohio commission on September 21, 1927, when Grubb was president and general manager, granted and issued a certificate to the corporation, The Interstate Motor Transit Company, the right to cross said new interstate toll bridge from the intersection of Second street and the north end of the bridge (same being intersection of U. S. Federal Aid Roads 23 and 52) to bus

terminal at Kentucky end of said bridge, called South Portsmouth, and turn and come right back across to said intersection and from thence to other points on said corporation's route. (Appendix, original certificate of said corporation, Plaintiff's Exhibit "V.") Such grant of the Ohio commission (Plaintiff's Exhibit "O," appendix) "may be deemed equivalent to a legislative declaration that, despite existing facilities, public convenience and necessity required the establishment by" The Interstate Motor Transit Company, the corporation, of its motor bus line between Portsmouth, Ohio, and South Portsmouth, Kentucky, over said bridge.

Buck v. Kuykendall, etc., 267 U. S., 307.

Kentucky having granted its permit to Grubb over the bridge and Ohio having granted its certificate to The Interstate Motor Transit Company over the very same bridge, the two grants, one by the Kentucky highway commissioner and the other by the Ohio commission, makes it unanimous, and that therefore that the issuance of the certificate by Ohio to The Interstate Motor Transit Company and the issuance of the permit to Grubb by Kentucky, "may both be deemed equivalent to a legislative declaration that, despite existing facilities, public convenience and necessity required the establishment" by Grubb of his interstate bus line.

Calling the court's attention to the bill of complaint, para. 15, we charge discrimination against interstate commerce.

> "Of course the state may not discriminate against interstate commerce."
>
> Morris, et al. v. Duby, et al., 274 U. S., 135.
> Buck v. Kuykendall, etc., 267 U. S., 307.

"A state cannot discriminate in favor of intrastate commerce against interstate commerce. No more can a state discriminate between interstate common carriers for hire by motor vehicles."

Magnuson v. Kelly, Commr., 35 Fed. (2nd), 867. Federal Reporter advance sheets of Jan. 6, 1930.

The charge of "subterfuge" comes with very poor grace from The Interstate Motor Transit Company, when the commission grants it the right to go to South Portsmouth and return, and prohibits Grubb from doing exactly the same thing. It is not a subterfuge. Kentucky says it is not as to Grubb. Ohio says it is not as to The Interstate Motor Transit. The Interstate Motor Transit Company is a direct competitor of Grubb. It admits this, for otherwise it is not in this case. The fact of its actual operation, the great new interstate bridge and the busy Ohio river valley in the region proves this. The Ohio river has just been improved for navigation and the president but recently dedicated the great project. "Competition is the bone of contention," and this necessarily proves the existence of interstate commerce in the region. (Grubb describes the region in his testimony and the business over this bridge in the appendix to this brief. The county surveyor Noel does the same thing and tells of the need of the bridge. See appendix.)

"If a state law relative to operation of motor vehicles for hire, directly interferes with or burdens interstate commerce, it cannot be sustained, regardless of the purpose for which it was passed."

Interstate Busses Corp. v. Holyoke St. Ry. Co., 273 U. S., 45. See also bottom of page 50 of the report.

So the reason of the commission, that if it granted Grubb, it would make it possible for Grubb to engage in intrastate commerce, and therefore to prevent this possibility after he began operation, it prohibited him from going across said interstate bridge by the order of April 2, 1928. But it being proved that there is commerce over this bridge, and it being admitted that said bridge connects the two states of Ohio and Kentucky, the commerce becomes commerce among the two states and the busses moving across and reacross are in interstate commerce and consequently the Ohio commission is without power and jurisdiction and discretion to prohibit said commerce by prohibiting bus movement over the Ohio river at Portsmouth, Ohio, "regardless of the purpose for which said order of prohibition was made."

Interstate Busses Corp. v. Holyoke St. Ry. Co., 273 U. S., 45.

Commerce Clause, Constitution of the United States, Art. 1, Sec. VIII.

Fourteenth Amendment to U. S. Const., Sec. 1.

The Ohio commission finding as to The Interstate Motor Transit Company that there was interstate commerce and the Kentucky department of motor transportation finding as to Grubb, under trade-name of The Tri-State Transit Company interstate commerce over the new interstate bridge between Portsmouth, Ohio, and South Portsmouth, Kentucky, and "the bone of contention" being competition between motor bus common carriers over said bridge, as to which congress has not legislated, it must follow that the order of the Ohio Public Utilities Commission in so far as the same prohibited Grubb,

d. b. a. The Tri-State Transit Company, as a motor bus common carrier in exclusively interstate commerce, "invaded a field reserved by the commerce clause for federal regulation," and that therefore neither the Ohio commission, nor the Ohio Supreme Court, had jurisdiction or power as to such interstate commerce, such jurisdiction or power being completely outside the scope of state power, such power being federal power exclusive of all state power. The lower District Court therefore erred in construing and applying the judgment of the Ohio Supreme Court as a judgment that decided the interstate commerce question, and then, after so construing and applying said judgment, holding the same res adjudicata and dismissing the bill and amendment thereto.

The Buck Case, 267 U. S., 307 to 316.
Bush & Sons v. Maloy, et al., 267 U. S., 317 to 325.
Clark v. Poor, et al., 274 U. S., 554.
Atlantic & Pacific Stages, Inc. v. Stahl, et al., The United States Daily of Dec. 7, 1929, page 6; Yearly Index, page 2646, columns 6 and 7. The West Publishing Co. advises that this decision is in process of publication in the Federal Reporter advance sheets.
Ohio Const., Sec. 2, Art. 4; Appendix, Plaintiff's Ex. "A-2."
Sections 614-101, 614-89, 614-2a and 502 (appendix hereto).

THE OHIO SUPREME COURT WAS TOTALLY WITHOUT JURISDICTION, SUCH JURISDICTION BEING WITHIN THE EXCLUSIVE JURISDICTION OF THE FEDERAL COURTS.

It has been shown:

(1) That the Ohio Supreme Court shall have such jurisdiction of administrative officers and their proceedings as may be conferred by law.

(2) That the Public Utilities Commission of Ohio is an administrative board, and has only such jurisdiction as is expressly conferred upon it by statute.

(3) That no jurisdiction or power has been conferred upon it as to questions of interstate commerce, but on the contrary Sections 502, 614-101 and 614-89 of the Ohio General Code (see appendix hereto) expressly declare that the entire public utility code of Ohio shall not apply nor be construed to apply to interstate commerce.

(4) That as to G. C. Section 544, which provides that the Supreme Court may revise an order of the commission, Section 614-89, G. C., provides that said Section 544 shall be subject to the limitations provided by Sections 502 and 614-101, which provide that Section No. 544 shall not apply to interstate commerce.

There is therefore no jurisdiction conferred on the Ohio Supreme Court to revise an order of the commission in so far as said order deals with the question of exclusive interstate commerce. And the Ohio Supreme Court so said in its opinion, saying "that the questions were fed-

eral in character and must be passed on by the federal authorities." The Supreme Court were advised in Grubb's brief that the federal questions were pending in the United States District Court. So the lower District Court said in its opinion, as heretofore quoted, to wit:

> "The state court failed to deal with the illegality of the commission's action and findings in relation to the constitutional guarantees and limitations."

The case of Magnuson v. Kelly, 35 Fed. (2nd), 867, supra, presents this exact situation. Kentucky has a provision like Ohio General Code Section 544, same being Sections 2739j-1 to 2739j-41, which provide for an appeal to the Circuit Court. Its motor transportation act, at Section 2739j-19, quoted on page 869 of the report, "provides that it shall not apply nor be construed to apply to interstate commerce, except in so far as permitted by the Constitution of the United States and the acts of congress." It was insisted in the United States court in that district that Magnuson should have gone to the Circuit Court and that he had an adequate remedy there at law. But the District Court overruled this contention and said:

> Syl. 3. "Provision of acts of Kentucky, 1926, c. 112, for appeal to Circuit Court from refusal of application for certificate of public convenience and necessity by commissioner of motor transportation, held inapplicable to applicant suing for injunction restraining commissioner and others from interfering with operation of interstate bus line, in view of Const. of United States, Art. 1, Sec. 8, and Const. Amendment 14."

We even have Ohio authority along this line cited earlier in this brief. Reference is made to Great Lakes Stages v. The Commission, 120 O. S., 491, 498 and 499.

These authorities and statutes can lead to but one conclusion, and that conclusion is that the Ohio Supreme Court was wholly without jurisdiction, and that there was no provision provided by Ohio law to take the interstate commerce question to the court,—and in view of the decision in The Great Lakes Stages case, Grubb could not confer jurisdiction on the court as to such question by filing a petition in error asserting the question.

We have shown earlier in this brief that he quoted Section 614-101, G. C., in his petition in error, which provides that the public utility statutes as to public utilities shall not apply nor be construed to apply to interstate commerce. Both the state and the lower District Court said in their opinions that the state court failed to deal with the constitutional guarantees and limitations. It is plain they applied the Section 614-101, G. C.

THE JURISDICTION OF THE FEDERAL COURTS IS EXCLUSIVE.

In Atlantic and Pacific Stages v. Stahl, et al. (U. S. District Court, Western District of Missouri), decided November 20, 1929, cited supra, after discussing and analyzing the cases of Clark v. Poor, 274 U. S., 554; Interstate Busses Corp. v. Holyoke St. Ry., 273 U. S., 45; Sprout v. South Bend, 277 U. S., 163 and 177, says:

> "The exclusive control of interstate commerce is given by the Constitution to congress. No state may

pass any law which prohibits or unduly burdens interstate commerce. For certain limited purposes a state may pass a law which incidently affects interstate commerce, provided it does not prohibit or unduly burden such commerce. Thus a state may pass a law imposing a tax upon a company operating motor vehicles exclusively in interstate commerce, over the highways of the state, if it is imposed for the upkeep and maintenance of those highways, provided it does not discriminate against interstate commerce." * * *

"If as applied it directly interferes with or burdens appellant's interstate commerce, it cannot be sustained regardless of the purpose for which it was passed. * * * No license from local authorities or a certificate of public convenience and necessity is required in respect of transportation that is exclusively interstate.

"The law then is that a state may not require a carrier doing both intrastate and interstate business to obtain a certificate or a license as to its intrastate business if that will burden its interstate business. Certainly if it cannot even burden a carrier's interstate business by requiring it to obtain a certificate of convenience and necessity, or a license as to its intrastate business, it cannot absolutely prevent its doing an interstate business, because it has not obtained as to its intrastate business such a certificate or license." * * *

"Suppose a law enacted by the legislature prohibited all persons from using the highways for the interstate transportation of passengers if they also carry passengers intrastate without a certificate of convenience and necessity, such a law could be defended only on the doctrine that a state may invade the exclusive field of legislation given by the Constitution to congress if it is done for the purpose of more effectively enforcing the state's laws. No such doctrine is tenable. Yet the law we have supposed is really what we have here as it has been construed

by the commission." (So the order in Grubb's case is supposedly promulgated by such a law of Ohio, when in truth and in fact there is no such law, unless it is one wrongly construed and applied.)

"The commission's order was not one which merely incidently affected interstate commerce. It was not made in the exercise of the police power for protection of public safety. It was as to this plaintiff an absolute and conditional prohibition of interstate commerce imposed not because of any failure by the plaintiff to comply with some conditions prescribed in the statutes as to such commerce, but as a punishment for past and possible future transgressions entirely unrelated to interstate commerce.

"If the plaintiff carries on an intrastate business on the highways of the state in defiance of the authority of the state, it may be punished for it. It may be punished by a fine or other pecuniary penalty or by imprisonment of its officers or agents. **But it may not be punished by the deprivation of its constitutional right to engage in interstate commerce."**

This case is exactly like Grubb's case. The commission sought to punish him for what The Interstate Motor Transit Company did in May, 1927, by prohibiting him from moving his busses over the interstate bridge at Portsmouth, Ohio, thereby preventing him from using them in interstate commerce. **Such commerce being exclusively within the federal scope and not within state scope, it must follow that the state judgment as construed is absolutely void.**

Section 614-100, quoted on page 17 (Appellee's printed part of the *Record*), paragraph 14, fixes the penalty that Grubb would suffer should he engage in intrastate commerce without a certificate. This will protect the rights

of the state and the public. But as stated by the court in The Atlantic and Pacific Stages case just quoted, a state cannot prohibit interstate commerce and thereby by such prohibition make the same a penalty for possible past or future violations.

THE PLEA OF RES ADJUDICATA.

The judgment of the Ohio Supreme Court, as construed by the District Court and applied by it as a bar, and thereby allowing itself to be ousted of its exclusive federal jurisdiction, is certainly reversible error, for the reason that the judgment as applied and construed, is absolutely void. **A void judgment is a nullity and can never become res adjudicata.**

THE DISTRICT COURT ERRED IN FAILING TO DECIDE THE FEDERAL QUESTIONS BEFORE IT ON THE MERITS.

The case in the District Court was fully and finally submitted November 10, 1928. It held it over 6 months and then dismissed the bill and amendment thereto, after construing and applying the state court's judgment and sustaining a plea of res adjudicata. The judgment being void, as construed, such plea can not be sustained. It was the duty of the court to decide the federal questions and exercise its exclusive jurisdiction. It failed to do this. We thus contend at Points Nos. 2, 10 and 11 of appellant's statement of points printed in the appendix hereto. Beginning with the Buck case, 267

U. S., 307, numerous decisions of this court and many of the decisions of the District Courts, hold that the jurisdiction over exclusive interstate commerce by motor common carrier for hire is exclusive. It was therefore the duty of the lower District Court to decide the federal questions and thereby exercise its exclusive federal jurisdiction.

Risty, et al. v. Chicago, R. I. & P. Ry. Co., 270 U. S., 378, and top of page 387:

> "It is the duty of the federal courts, in suits brought in or removed to them, to decide for themselves all relevant questions of state law, and while they will follow the decisions of state courts as to the interpretation of a state statute, we do not think that the case of Gilseth v. Risty, 46 S. D., 374, so clearly or decisively passed upon the question here involved as to control our decision." From page 387 of Risty case, supra.

Kuhn v. Fairmont Coal Co., 215 U. S., 349.

CONCLUSION.

Summing up, appellant believes that if the following two questions are properly answered, the decision and finding of the lower District Court must be reversed.

These questions are as follows:

First. Did Grubb propose to become an "Ohio motor transportation company public utility?"

Second. Is the jurisdiction of the federal government and its courts exclusive in the regulation of a motor bus common carrier of passengers for hire that carries such passengers in interstate commerce exclusively?

We contend that the first question should be answered

"**No.**" The Ohio Constitution and statutes reviewed in this brief and set forth in the appendix of it plainly show that Grubb's proposed operation was interstate commerce **only.** Even as against intrastate commerce an order of the Ohio commission is not an injunction. No stay or injunction was granted by the Ohio Supreme Court in either of the two cases before it. Section 614-93, G. C., "Motor Transportation Act," allows intrastate motor carriers to immediately re-apply after a certificate has been refused, and this is true even though the Supreme Court has exercised "revisory jurisdiction" as to the order refusing such intrastate carrier. Section 614-67, G. C., appearing in the appendix to this brief as Plaintiff's Exhibit "A-1", provides that before an order of the commission can become a judgment or decree by way of injunction or mandamus, the attorney general must bring an action in a court of competent jurisdiction after being advised by the commission.

> Sylvania Telephone Co. v. Commission, 97 O. S., 202, 208 (See "Statement of Points," Appendix, Point 9 (f)).

As to question No. 2 above, we contend that it should be answered "**Yes.**"

> "That the motor age has dawned does not change the law, and, beginning with Buck v. Kuykendall, 267 U. S., 307, wherein Mr. Justice Brandeis, for the court said: 'Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the commerce clause. It also defeats the purpose of

congress expressed in the legislation giving federal aid for the construction of interstate highways' * * * down through Bush v. Maloy, 267 U. S., 317; Interstate Busses Corporation v. Holyoke Street Railway Co., et al., 273 U. S., 45; Interstate Busses Corporation v. Blodgett, Tax Commissioner of Conn., et al. (February 20, 1928), 48 S. Ct., 230; Clark v. Poor, 274 U. S., 554, and Sprout v. City of South Bend, Indiana, May 14, 1928, 48 S. Ct., 504, which treat of similar cases from the states of Washington, Ohio, Connecticut, Maryland, Massachusetts, and Indiana, there has been a consistent maintenance of the supremacy of the nation over such interstate traffic."

Hi-Ball Transit v. Railroad Commission of Texas, 27 Fed. (2nd), 425.

To the list of states mentioned by Judge Atwell in the last quoted case, may be added Kentucky and Missouri, the Federal District Court sitting in said two states also holding that the federal government's supremacy over interstate traffic solely is supreme.

Magnuson v. Kelly, Commissioner, 35 Fed. (2nd), 867;

Atlantic & Pacific Stages v. Stahl, et al., cited supra.

In the Hi-Ball case from Texas just referred to, the three-judge court said:

"This court would have no more jurisdiction to order the commission in the intrastate field than does the commission have in the interstate field."

Sanger v. Lukens (D. C.), 24 Fed. (2nd), 226;

Hi-Ball Transit v. Railroad Commission of Texas, 27 Fed. (2nd), 425.

We therefore conclude that the decree of the District Court should be reversed, that it be required to exercise its exclusive federal jurisdiction on the record made and submitted to it November 10, 1928, or in the alternative that this court make such order in the premises that will grant appellant the relief prayed for in his bill of complaint and amendment thereto.

Respectfully submitted,

JOHN F. CARLISLE,
406 Hartman Bldg., Columbus, Ohio,
FRANK M. RAYMUND,
16 East Broad St., Columbus, Ohio,
ANDREW WILSON,
1033 Woodward Bldg., Washington, D. C.,
Counsel for Appellant.

APPENDIX.

Statement of Points.

Comes now the appellant in this cause and states the points upon which he intends to rely in this court in this case, as follows:

Point 1.

The District Court of the United States for the Southern District of Ohio, Eastern Division, erred in dismissing the complaint, amendment to complaint and this case, and dissolving the temporary restraining order.

Point 2.

Said District Court erred in failing to exercise its federal jurisdiction and power, for the reason stated in its opinion, that the question of res judicata or estoppel "is entirely independent of the question of the jurisdiction of this court."

Point 3.

The District Court erred in granting leave to file and the filing of the answer of the Public Utilities Commission of Ohio and the supplemental and amended and amendment to answers of the corporation defendants, out of rule, and in admitting in evidence Exhibit "X-I."

Point 4.

Said District Court erred in interpreting and applying the judgment of the state court, and in holding that said judgment so interpreted and so applied was res judicata

or an estoppel and by so holding ousted itself of full prior acquired federal jurisdiction and power.

Point 5.

Said District Court erred in failing to exercise its exclusive jurisdiction of the interstate commerce question, and in failing to find and hold that the judgment of the state court, as interpreted by said District Court, was totally outside the scope of state power.

Point 6.

Said District Court having in its opinion found that the "state court in its opinion (119 O. S., 264) failed to deal with the illegality of the commission's action and findings in relation to the constitutional guarantees and limitations", it was error for said District Court to find and hold the said judgment of the state court res judicata or estoppel as to the same constitutional guarantees and limitations involved and drawn in question in the bill of complaint and the amendment to the bill of complaint and issues raised in the equity suit in said District Court.

Point 7.

Said District Court erred in failing to exercise its full exclusive federal jurisdiction and power on the issue raised by paragraph 15 of the bill of complaint, as follows:

> "That plaintiff is and will be in competition in the operation of his said bus line, with all the defendant corporations and especially with one of the defendants, The Interstate Motor Transit Company, which said company is now operating between Columbus, Ohio, and Huntington, West Virginia; that

> on the twenty-first day of September, 1927, the defendant, the Public Utilities Commission of Ohio, granted to said The Interstate Motor Transit Company, the right to operate its said bus line from Portsmouth, Ohio, to South Portsmouth, Kentucky, and return, crossing and recrossing the Ohio river, over the bridge between said points, as a part of its route between Columbus, Ohio, and Huntington, West Virginia; that said certificate is still in effect and said company is still operating between said points; that said commission by its order has prohibited this plaintiff from operating over the identical route between Portsmouth, Ohio, and South Portsmouth, Kentucky, which by its order of September 21, 1927, it granted to plaintiff's said competitor; all in violation of plaintiff's right to the equal protection of the laws and contrary to the Fourteenth Amendment to the Constitution of the United States of America,"

in that by so failing to exercise its federal jurisdiction, it gave full effect to the prohibitory part of the Ohio Public Utilities Commission's order of April 2, 1928, reading as follows:

> "Ordered, that said applicant be, and hereby he is prohibited from incorporating within the regular route upon which he will herein be granted a certificate to operate within the state of Ohio, any movement which shall provide for the crossing and recrossing of the Ohio river, at Portsmouth, Ohio,"

and thereby discriminated in favor of the interstate commerce of The Interstate Motor Transit Company and against this plaintiff-appellant, J. P. Grubb.

Point 8.

The record herein showing that appellant never owned or operated under a certificate issued to him, and it being admitted in this case, that said appellant applied for

the first time to the Ohio Public Utilities Commission for a certificate and was willing to comply and obey, and has been and is now actually complying with and obeying the laws and police regulations of Ohio applicable to and concerning motor bus common carriers and that the states of West Virginia and Kentucky had granted permits to appellant to operate in interstate commerce from and to their border points and meet and connect with the interstate route applied for in the state of Ohio, said District Court erred in construing said part of the order of said Ohio commission that prohibited appellant from crossing and recrossing the bridge over the Ohio river at Portsmouth, Ohio, and also in interpreting and applying the judgment, decision and opinion and order of the Ohio Supreme Court (The Interstate Motor Transit Company, et al. v. The Public Utilities Commission of Ohio, No. 21098, filed April 19, 1928; and J. P. Grubb v. The Public Utilities Commission of Ohio, No. 21184, filed May 31, 1928, 119 O. S., 264) as res judicata or an estoppel and a bar to the suit in said District Court.

Point 9.

The District Court erred in construing and applying Section 544 of the General Code of Ohio, which section gives the Ohio Supreme Court "revisory jurisdiction" "to reverse, vacate or modify a final order of the Public Utilities Commission," and in ascribing to said Ohio Supreme Court a jurisdiction to control and regulate "commerce among the several states", and in holding the judgment of said state court in Grubb v. The Public Utili-

ties Commission of Ohio (119 O. S., 264) res judicata in this federal equity suit, for these reasons:

(a) Ohio Constitution, Art. IV, Sec. 2:

"The Supreme Court shall" * * * "have" "such **revisory jurisdiction** of the proceedings of administrative officers as may be conferred by law."

In pursuance of this constitutional grant, the Ohio general assembly has enacted the public utility code of Ohio, (Chapter I, Division II, Title III, Part First) being Sections 487 to 614-102, both inclusive, of the General Code of Ohio, which, at Sections 502, 614-89 and 614-101, in so far as applicable read:

"Section 502. (Application of act) This chapter shall apply to the transportation of passengers and property **between points within this state,**" * * * "In addition thereto the provisions of this act shall apply to regulation of any and all other duties, * * * **excepting only, that they shall not apply to the regulation of commerce with foreign nations, and among the several states, and with the Indian tribes.**"

"Section 614-89. (Applications and proceedings before the commission and Supreme Court.) In all respects in which the Public Utilities Commission has power or authority under this act (G. C., Sections 614-2, 614-84 to 614-102, and 6292), applications and complaints may be made and filed with such commission," * * * "and all proceedings before the Supreme Court of this state considered and disposed of by such court in the manner, **under the conditions and subject to the limitations** and with the effect specified in the sections of the General Code governing the supervision of other public utilities by the commission."

"Section 614-101. (Intrastate commerce only.) Neither Sections 614-84 to 614-102, inclusive, of the General Code, **nor any provision thereof, shall apply**

or be construed to apply to commerce with foreign nations or countries, or among the several states of this Union, except in so far as the same may be permitted under the provisions of the Constitution of the United States and the acts of congress."

(b) Both the commission and the Ohio Supreme Court are limited in their jurisdiction to intrastate commerce, and expressly denied jurisdiction as to interstate commerce. The attempt of the Ohio commission to prohibit exclusive interstate commerce over the Portsmouth-South Portsmouth bridge over the Ohio river to and from Kentucky was beyond and outside of the scope of its jurisdiction and discretion; to "affirm" said order in so far as the same prohibited any movement across said bridge was equally beyond and outside of the scope of the jurisdiction of the state court, and being beyond and outside the scope of its jurisdiction, the judgment of the state Supreme Court could not be nor become res judicata in the District Court of the United States.

(c) No judgment of any court can become res judicata unless that court had jurisdiction to render the judgment in question.

(d) The Ohio Supreme Court did not decide the questions presented in this cause nor had it jurisdiction to consider or decide them. (119 O. S., 264.)

(e) The Supreme Court of Ohio neither considered nor decided any federal constitutional questions in the case of Grubb v. The Public Utilities Commission. Therefore no appeal from that judgment to the Supreme Court of the United States was possible. The United States District Court erroneously found the same decision res

judicata because, so the District Court held, the Supreme Court of Ohio might have passed upon the federal question. Thus, Grubb is effectually preventing from obtaining any decision from a federal court upon the federal constitutional and interstate commerce questions involved in this cause, unless the judgment of the District Court be reversed.

(f) The plaintiff-appellant, being an applicant to operate and operating in interstate commerce solely and exclusively, is not an Ohio public utility, and the Ohio public utility code as construed and applied, has no application as to him.

Point 10.

Said District Court erred in failing to exercise its federal jurisdiction and decide the case on the issues made and proof and evidence fully and finally submitted November 10, 1928, for the reason that it was without jurisdiction and power, to permit or recognize the judgment of a state court in a revisory proceeding brought after its jurisdiction had fully attached and restraining order granted, issued and served, the judgment of the state court being rendered after the case was finally submitted in said District Court.

Point 11.

Said District Court erred in interpreting and applying the judgment of the state court as a plea in bar, and thereby permitting itself to be ousted of its federal jurisdiction, for the reason that the judgment, decision, opinion and order of the state court did not decide any federal question and hence an appeal could not be had to the

United States Supreme Court from the decision of said state court, Grubb's case in said state court being not a case of the kind in which a decision of the federal question could be had.

Subpoena and Marshal's Return.

The United States of America, Southern District of Ohio, Eastern Division.

The President of the United States of America, to the Marshal of the Southern District of Ohio, Greeting:

You are hereby commanded to subpoena the Public Utilities Commission of Ohio, William Klinger, James W. Huffman and Frank Mauller, members of and constituting said the Public Utilities Commission of Ohio, The Interstate Motor Transit Company, The Cannonball Transportation Company, The Portsmouth Public Service Company, The Ohio Valley Bus Company, The Ohio Electric Railway Company, Elsa Cantor, sheriff of Scioto county, and ..... Sheets, chief of police of Portsmouth, citizen of and resident in the the state of Ohio, if they be found in your district to be and appear in the District Court of the United States for the Eastern Division of the Southern District of Ohio, aforesaid, at Columbus, to answer a certain bill in chancery, filed and exhibited in said court, against them by J. P. Grubb, a natural person, proposing to operate interstate The Tri-State Transit Company citizen of and resident in the state of Ohio.

Hereof you are not to fail under the penalty of the law thence ensuing.

You will make due return of this writ on or before the tenth day of May, A. D. 1928.

Witness the Honorable B. W. Hough, judge of the District Court of the United States, this twentieth day of April, A. D. 1928, and in the one hundred fifty-second year of the Independence of the United States of America.

Attest:

[Seal.] H. F. Rabe, Clerk,
By C. P. White, Jr., Deputy.

The said defendants are required to file their answers or other defense in this suit in the clerk's office of said court on or before the twentieth day after service of this subpoena, excluding the day thereof, otherwise the said bill may be taken pro confesso.

(Signed) H. F. Rabe, Clerk,
By C. P. White, Jr., Deputy.

U. S. Marshal's Return.

Received this writ at Columbus, Ohio, on April 21, 1928, and served same as follows:

On April 23, 1928, served the within named The Cannonball Transportation Company, by delivering a true copy of this writ, with the endorsements thereon, to Charles Arthur, manager of said company, personally at Portsmouth, Ohio.

On April 23, 1928, served the within named The Interstate Motor Transit Company, by delivering a true copy of this writ, with the endorsements thereon, to Charles Arthur, manager of said company, personally at Portsmouth, Ohio.

On April 23, 1928, served the within named The Ports-

mouth Public Service Company, by delivering a true copy of this writ, with the endorsements thereon, to C. T. Long, manager of said company, personally at Portsmouth, Ohio.

On April 23, 1928, served the within named The Ohio Electric Railway Company, by delivering a true copy of this writ, with the endorsements thereon, to Cliff Thurma, manager of said company, personally at Ironton, Ohio;

No chief officer or higher representative of any of the foregoing named defendants found in this district upon whom to effect service.

And on April 23, 1928, served same on the within named Elza Cantor, sheriff of Scioto county, and Harry S. Sheets, chief of police of Portsmouth, Ohio, by delivering to each a true copy of this writ, with the endorsements thereon, personally at Portsmouth, Ohio.

And on April 25, 1928, I served the within named the Public Utilities Commission of Ohio, by delivering a true copy of this writ, with the endorsements thereon, to William Klinger, chairman of said commission, personally at Columbus, Ohio;

And on the same day I served the within named William Klinger, Frank B. Mauller and James W. Huffman, members of and constituting said the Public Utilities Commission of Ohio, by delivering to each personally a true copy of this writ, with the endorsements thereon, at Columbus, Ohio.

The Ohio Valley Bus Company not served; no official of said company found in this district.

Stanley Borthwick,
U. S. Marshal S. D. O.
By Jos. L. Lowey, Deputy.
By J. Norsb, Deputy.

(Unprinted Transcript, 20.)

Entry.

[Filed May 10, 1928.]

Upon application of the plaintiff and for good cause shown, the temporary restraining order heretofore issued is hereby extended to May 20, 1928, and the hearing upon the application for a temporary injunction is May 20, 1928.

Benson W. Hough.

Dated 5/8 1928.

(Unprinted Transcript, 41.)

Entry.

[Filed May 19, 1928.]

Upon application of the plaintiff and for good cause shown, the temporary restraining order heretofore issued herein is hereby extended to May 31, 1928, and the hearing upon the application for a preliminary injunction is also extended to said time.

Benson W. Hough,
Judge.

Dated May 19, 1928.

(Unprinted Transcript, 42.)

Entry.

[Filed May 29, 1928.]

Upon application of the plaintiff and for good cause shown, the temporary restraining order heretofore issued herein is hereby extended to June 11, 1928, and the hearing on the application for a temporary injunction is also extended to said time.

Benson W. Hough,
Judge.

Dated May 29, 1928.

(Unprinted Transcript, 43.)

Entry.

[Filed June 8, 1928.]

Upon application of the plaintiff and for good cause shown, the temporary restraining order heretofore issued herein is hereby extended to ....., 1928, and the hearing on the application for a temporary injunction is also extended to said time.

Benson W. Hough,
Judge.

Dated June 8, 1928.

(Unprinted Transcript, 44.)

Benson W. Hough,
District Judge.

United States District Court
Southern District of Ohio
Judge's Chambers
Columbus

Columbus, O., Oct. 5, 1928.

To Counsel of Record in the Case of Grubb v. Public Utilities Commission, et al., No. 627 In Equity:

Gentlemen: The above case is set for trial upon the merits, for Saturday, November 10, 1928, at 9:30 a. m.

The personnel of the court to be present here on that date is Hon. Charles Moorman, circuit judge, Hon. Smith Hickenlooper, district judge, and myself.

It is highly desirable that the case be prepared by counsel ready for submission at that time, and that everything be done in advance. It is desirable that an attempt be made to stipulate as many of the facts as possible, and that the facts in dispute be covered and presented in the form of depositions. It is further suggested that briefs be prepared in advance, and to that end the plaintiff's briefs should be on file on or before the twentieth of October, the defendant's briefs on or before the third of November, and the plaintiff's reply brief by the hearing date.

It must be remembered that it is quite difficult to arrange for the constituting of a three judge court under Section 266 of the Civil Code, in that it disturbs the set program of three separate courts. This is the reason that the above arrangements have been made, and it is hoped that the entire co-operation of all counsel concerned may be secured.

Respectfully,
(Signed) Benson W. Hough,
U. S. District Judge.

(Unprinted Transcript, 136.)

In the District Court of the United States, Southern District of Ohio, Eastern Division.

J. P. Grubb, Etc., Plaintiff,
vs.
The Public Utilities Commission of Ohio, et al., Defendants.
No. 627 In Equity.

Testimony.

Taken before Honorables Charles N. Mooreman, Smith Hickenloqper and Benson W. Hough, judges of the United States District Court, on the tenth day of November, 1928.

Present:

Messrs. Frank M. Raymund and John F. Carlisle, on behalf of the complainant.

Mr. A. Z. Blair, representing The Interstate Motor Transit Company and The Cannonball Transportation Company.

Mr. A. R. Johnson, representing The Portsmouth Public Service Company and The Ohio Valley Bus Company.

Saturday Morning Session, November 10, 1928.

Mr. Raymund: If the court please, we have been taking depositions and by stipulation have offered a large number of exhibits which your Honors have before you. There is just one other point that will involve probably three or four questions from one witness that we would like to have added to the testimony before arguing the case.

Judge Moorman: Call the witness.

J. P. Grubb

called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Raymund.

I am J. P. Grubb the plaintiff in this case and am now operating an interstate motor bus line between Columbus, Ohio, and Huntington, West Virginia. I do not sell tickets to passengers from any point in Ohio to any other point in Ohio. I do not as a matter of practice in fact carry passengers from any point in Ohio to any other point in Ohio. I do not sell tickets or carry passengers from any point in Kentucky to any other point in Kentucky, and I do not sell tickets or carry passengers from any point in West Virginia to any other point in West Virginia.

Cross Examination by Judge Blair.

I pay toll for my busses and passengers over the bridge over the Ohio river between Portsmouth, Ohio, and Kentucky. The toll is thirty cents per bus and five cents per passenger, that is to say, thirty cents per bus for across each way, and I pay both ways.

I believe I met a man by the name of Griffith in Huntington, the day before we had the hearing at Portsmouth. I never directly or indirectly had any communication with him prior to that time, nor did any one else for me.

Judge Hickenlooper: Is your line from Columbus, Ohio, to Huntington, West Virginia?

The Witness: Yes.

(Unprinted Transcript, 137 and 138.)

Excerpts from Testimony of J. P. Grubb.

J. P. Grubb,

of lawful age, being first duly sworn, testified as follows:

Direct Examination by Mr. Raymund.

My name is J. P. Grubb, and I am the plaintiff in this case. I am now engaged in the transportation of interstate passengers from Columbus, Ohio, to Huntington, West Virginia, and operate that business under the tradename of The Tri-State Transit Company.

I am a citizen of the United States, and at the time I filed this action I resided at Portsmouth, Ohio, but now I reside in Huntington, West Virginia. When I filed my bill of complaint I proposed to operate an interstate bus line from Columbus, Ohio, to Huntington, West Virginia. On January 23, 1928, I filed an application with the Public Utilities Commission of Ohio for a so-called certificate of convenience and necessity for permission to operate motor busses carrying passengers for hire in interstate commerce only. The hearing on my application was had March 13, 1928, before the Public Utilities Commission of Ohio. I proposed, after getting the permission applied for, to put in operation eight busses, seven regular and one emergency. When I had my hearing I was able and willing to pay all taxes to the state of Ohio, required by its laws, and also taxes to the states of Kentucky and West Virginia required by their laws. I also told the commission that I was willing to obey all police regulations of Ohio and offered to do so. There were counsel there for opposing companies but I can not say there

were any written protest. These counsel were there protesting, and they are the same companies that are the defendants in this case. At the conclusion of the hearing the commission granted my application from the bench, saying "granted as prayed for, to become effective April 1, 1928." When the order came out from the commission it said that it was not to begin operation until May 1, and the portion of the route from Portsmouth, Ohio, to South Portsmouth, Kentucky, and return, would not be granted. I again applied to the commission to change the order and they changed it to become effective April 17, I believe. I wanted my Ohio permit to become effective before my Kentucky permit would become void.

The busses were purchased before my Ohio hearing but I, after the hearing, relying on what the commission said, made all plans to begin operations and got my crew lined up and hired. I started operations April 25, 1928. Before this date I filed this suit and a temporary restraining order had been issued in this suit restraining the defendants from interfering with the operation from Portsmouth, to South Portsmouth and return, over the bridge that was finished in the summer of 1927. Portsmouth has a population of about 60,000. At South Portsmouth, Kentucky, and on the Kentucky side for a distance, within a two miles radius from the end of the bridge in Kentucky, there live from 6000 to 7500 people approximately. Everyone has a different opinion and there is no way to get a real accurate * * *. The different places go under different names, such as, South Portsmouth, Fullerton, Firebrick,—there are some three or

four villages altogether comprising about 6000 people. South Portsmouth is important from a traffic standpoint, the Chesapeake & Ohio Railroad having its depot in South Portsmouth, Kentucky, through which people come and go. As to the number of people, I can best answer by saying that this railroad company wanted someone to contract to operate a bus, hauling passengers, from Portsmouth to South Portsmouth and return, and they give the figures as passengers, 4000 per month. Before the hearing before the Ohio commission I knew that South Portsmouth was an important point for traffic for busses, having learned this when I was manager of The Interstate Motor Transit Company. The Interstate Motor Transit Company is a corporation and operates this identical same route to South Portsmouth, Kentucky. I was manager of The Interstate Motor Transit Company when the bridge was finished, and very shortly after the bridge was finished we got permission from the Ohio Public Utilities Commission to operate over the new bridge to South Portsmouth, Kentucky. Shortly after we began to operate over that bridge there was considerable increase in our gross receipts. I would approximate this increase between $3000 to $3500 per month. At that time I had access to the records of The Interstate Motor Transit Company. This "Exhibit No. 1" is the transcript of the hearing before the Public Utilities Commission of Ohio, in the matter of my application to operate a motor bus line from Columbus to Huntington. In that hearing I was examined by Mr. Bannon regarding that part of the route between Portsmouth, Ohio, and South Ports-

mouth, Kentucky. None of the other attorneys questioned me on that subject. Portsmouth, Ohio, is separated from South Portsmouth, Kentucky, by the Ohio river. There is a bridge across there and one can go across in a very short time, depending on how you go. My purpose in my application to the Ohio commission was to carry passengers down the Scioto valley by U. S. Route 23 and deliver them at South Portsmouth, Kentucky, but I did not apply to carry passengers whose whole and complete ride was between Portsmouth, Ohio, and South Portsmouth, Kentucky. I could not carry a passenger from Columbus, Ohio, to Portsmouth, but I could carry a passenger from Columbus to South Portsmouth, but I could not carry that passenger from South Portsmouth back to Portsmouth, because I did not so apply. I never had any arrangement to get passengers between Portsmouth and South Portsmouth. My busses will travel from South Portsmouth back to Portsmouth but will carry no passengers whose whole and complete ride is between Portsmouth, Ohio, and South Portsmouth, Kentucky. The roads on the Kentucky side from South Portsmouth to Russell are not yet in condition to operate a bus line, and it may be some time yet before the road is sufficiently improved.

My rate schedule filed with my application to the Ohio commission shows rates from South Portsmouth, Kentucky, to New Boston, Sciotoville and Wheelersburg, and on through Ohio, and I applied to carry passengers from South Portsmouth to and through New Boston and points east, but I will not take such passenger if I know he was

going to get off in Portsmouth, Ohio. I will operate over the bridge just as we did when I was president and general manager of The Interstate Motor Transit Company.

There was no other testimony before the commission at my hearing on the question of so-called subterfuge in my applied for route as described in my application from Portsmouth to South Portsmouth and return.

My busses go across the bridge to the south end of the bridge, which is about 2½ or 3 squares from the C. & O. Railway depot. Numbers of passengers from the C. & O. Railroad take my bus where I turn around. These passengers take passage from South Portsmouth, Kentucky, to all points on my entire route except to Portsmouth, Ohio, that is from South Portsmouth to all points in compliance with my tariff. We have no tariff from Portsmouth to South Portsmouth and from South Portsmouth, Kentucky, to Portsmouth, Ohio. In going south I take no passengers on the bus after leaving Lucasville, Ohio, and coming north, I take on no passengers for South Portsmouth after leaving New Boston. The C. & O. Railroad furnish free bus transportation for their passengers between Portsmouth and South Portsmouth, that is, if a passenger buys a C. & O. Railway ticket he gets transportation across the bridge. Before the bridge was built there were two steam ferries operating across the Ohio river at Portsmouth. Before the bridge was built The Interstate Motor Transit Company had a joint time and tariff schedule with the L. & L. bus line, which bus line operated from Portsmouth, Ohio, to Fullerton, Kentucky, and down to Maysville, Kentucky. This joint tariff was

filed with the Ohio commission, and we would sell transportation to any point over the L. & L. bus line, and L. & L. bus line would sell transportation over the route of The Interstate Motor Transit Company. At the time I was manager of The Interstate Motor Transit Company the L. & L. bus would come over to Portsmouth by ferry. Passengers would buy tickets for the Kentucky side and we would bring them to the L. & L. bus, but instead of boarding the bus they would walk away. Objections were filed against The Interstate Motor Transit Company with the Ohio commission. A hearing or conference was had and at the commission's request we discontinued the joint tariff and the practice until the bridge was completed. After the bridge was completed and while I was president and general manager, we applied to extend our route and run across the bridge to South Portsmouth from Portsmouth. The Ohio commission granted our extension and amended our certificate so that the privilege of crossing the new bridge was granted to The Interstate Motor Transit Company. The Interstate Motor Transit Company has ever since and is now running its busses across the bridge to South Portsmouth, Kentucky, to the same point at the south end of the bridge as I applied to do, and The Interstate Motor Transit Company turns its busses around there at the south end of the bridge also. They also take passengers and discharge passengers at that point. The Cannonball Transportation Company and the South Portsmouth bus line also run across the bridge. The C. & O. bus crosses the bridge and goes down to the C. & O. depot. The

Portsmouth-South Portsmouth bus goes down some couple of squares from the Kentucky end of the bridge and turn, and then go up the river a short distance to Fullerton. The Cannonball crosses the bridge, goes up to Fullerton and turn and then come back across the bridge.

The nearest bridge to the Portsmouth-South Portsmouth bridge is up the river about 30 miles, between Ironton, Ohio, and Russell, Kentucky. Down river the nearest bridge is across the Ohio river at Cincinnati, about 113 miles by the Ohio river. There are towns of considerable importance on both sides of the Ohio river up and down from Portsmouth. There is considerable population on both sides of the river up and down river from Portsmouth. The population is all along the river on both sides. The new bridge between South Portsmouth and Portsmouth is the gateway between Ohio and Kentucky by considerable number of people. It is the only means to go across for a considerable distance without the ferries. There is a ferry 20 miles up the river from Portsmouth, and there is a little daylight ferry down the river. There is another down the river at Maysville, which is 50 miles.

The route I applied for in my application to the Ohio commission was for **interstate traffic only**, and the portion of the route over the new bridge at Portsmouth, Ohio, to Kentucky **was only for interstate hauling of passengers and for no other purpose. I do not haul intrastate passengers in Ohio at all, and I do not haul intrastate passengers in the states of West Virginia and Kentucky. I could not carry a passenger from Portsmouth, Ohio, to**

Columbus, nor from Columbus, Ohio, to Portsmouth, Ohio, because such a passenger would be intrastate; nor could I carry a passenger from Portsmouth, Ohio, to any other point on my line in Ohio. A passenger who bought a ticket from Columbus, Ohio, to South Portsmouth, Kentucky, could not get off the bus at Portsmouth for the reason that there is no stop in Portsmouth for passengers, neither to let passengers off or on. We go direct to South Portsmouth before making any stops. If I am prohibited from crossing the bridge either way I could not haul any interstate passengers on my busses who wanted to come to South Portsmouth. If I am prohibited from crossing this bridge I could not carry any passenger from Columbus and way points to any point in Kentucky, except Russell, Kentucky, and points from there to Huntington. In other words, I would be prohibited from carrying any passengers bound for other points in Kentucky and points from there to Huntington, if I wouldn't cross the bridge at Portsmouth to South Portsmouth.

I recall the statement of Judge Blair of the amount of traffic which The Interstate Motor Transit Company gained from crossing the bridge from Portsmouth to South Portsmouth and return. Judge Blair said that that was why the receipts picked up the latter part of 1927, additional business from and to South Portsmouth. Judge Blair in the hearing before the commission stated that the increase from the traffic to The Interstate Motor Transit Company over the Portsmouth-South Portsmouth bridge approximated $3000 per month.

After the Ohio commission made its order and before I began to operate the corporation defendants, other than the commission, brought an injunction suit against me and the commission in the Common Pleas Court of Scioto county, Ohio.

To the best of my knowledge nothing has been done in that case since the suit in the United States District Court was filed. The corporation defendants, who were protestants before the commission took appeal to the Supreme Court of Ohio. On April 25, 1928, I began to operate my bus line under permission granted by the Utilities Commission of Ohio, the commissioner of transportation of Kentucky and the officers of the state of West Virginia. I have been operating my bus line continuously since that date and am operating it now. I have not directly or indirectly offered to sell my bus line or permits to any of the defendant companies or to any one else since I began to operate, and I had never offered to sell them before, and have not done anything looking to a sale of my property or franchise to any person,—and there has been no negotiations with me or anyone representing me for the purchase of my bus line. Although charged, I did not obtain my permits and start this bus line with the intention of compelling the defendants or some of them to buy me out.

The first of the various companies started was The Cannonball Transportation Company. At first it run from Portsmouth to Ironton, Ohio; later to Huntington, West Virginia, and later to Chillicothe, Ohio. It now runs from Chillicothe to Portsmouth, to Ironton, to Ash-

land, Kentucky, to Huntington, West Virginia. The one that runs from Portsmouth, Ohio, to South Portsmouth, Kentucky, is just a short line between there. It is all Cannonball Transportation Company. The next company started was The Interstate Motor Transit Company. I started the Cannonball. I sold the Cannonball before they started the Interstate. I did not start the Interstate. The Interstate was incorporated by people of Chillicothe when I was not interested in the Cannonball, having been out of the Cannonball for some eleven months. I later became manager of the Interstate. In February, 1927, The Interstate Motor Transit Company bought the Cannonball company back from the Williams interests.

On December 23, 1927, I turned in my resignation to become effective not later than January 15, 1928, and I continued as manager until January 15, 1928. I sold my stock in the companies February 2, 1928. On January 23, 1928, I filed my application for a permit with the Public Utilities Commission of Ohio to operate as The Tri-State Transit Company.

Mr. F. M. Semsworth of Huntington, who was manager of other companies for the Chicago Public Service, is manager of The Interstate Motor Transit Company.

When I began operating as The Tri-State Transit Company I operated seven busses and one additional bus. Now I operate ten and one extra, a total of eleven, this one is for reserve. I maintained a constant schedule over this route, increasing the number of busses from time to time. There have been changes in the rates since

I began to most points. Rates have been cut. When I began my rates were some little less than the Interstate as they were considerable higher than the Cannonball, and then after I began operation the Interstate and Cannonball and Ohio Valley have all cut, and I met their cut, and they cut again and I met it. I am talking now of the Interstate. I met the Interstate cut all the way through. When I began the one-way rate from Columbus to Huntington was $4.45. Now it is $4.40 round trip. The short ride rates have been cut some but not quite as much proportionately.

I still hold the permit granted by the department of motor transportation of Kentucky, Number 2204. That was granted me before I obtained permit from Ohio. The Kentucky permit granted me, operating under the trade-name of The Tri-State Transit Company, and is dated January 30, 1928. I applied in all three states about the same time.

The corporation defendants or their officers threatened that if I obtained a permit to run this bus line, that they would law me to death, break me up, put so many busses on the road there wouldn't be no chance for mine; I didn't have any means to start a bus line, couldn't get started, that they would law me to death. The manager of the Interstate and the Cannonball and the Ohio Valley threatened that they would put so many busses on the road that there would be no room for me. Mr. Semsworth made these threats. He was manager of these three companies.

The threats of lawing me to death, that is, breaking

me up lawing and all was made up by the attorney for The Interstate Motor Transit Company and The Cannonball Transportation Company. That attorney's name is Judge A. Z. Blair.

Judge A. Z. Blair, attorney for The Interstate Motor Transit Company and The Cannonball Transportation Company, made these statements about the time I was making application for this line to my attorney, Mr. Edward G. Miller, and Judge told him that I didn't have any money, nobody to back me, that I wouldn't get a permit, and that if I did get it that these other companies would law me to death, they were going to take me through the U. S. federal court, give me a taste of that, see how I liked it.

After injunction suit in Scioto county Common Pleas Court was begun I was served with a subpoena. That subpoena commanded me to come to Judge Blair's office and bring all my books, papers, contracts, promissory notes and correspondence. I did not appear.

I became interested in motor bus transportation in the vicinity of Portsmouth to Huntington the first of March, 1923. Before that I was in the automobile and tire business. I am familiar with the district from Columbus, Ohio, to Huntington, West Virginia. The business has increased rapidly for the past five years and is still increasing rapidly. In May, 1928, we hauled 3458 full fare and 20 half fares; in June, we hauled 6089 full fare and 150 half fares; in July, we hauled 9684 full fares and 170 half fares; in August, we hauled 12,043 full fares and 170 half fares; in September, we hauled 16,565 full fares and

126 half fares. That is the increase in passengers, while the revenue increased per day and per mile in accordance. During this same period The Interstate Motor Transit Company increased their seating capacity from 14 passenger busses to 29 passenger busses, and the same number of busses as before. As I heretofore stated I increased my equipment also.

The Tri-State Transit Company is not a corporation. It is simply a trade-name which I adopted and under which I have been operating.

The eight seventeen-passenger busses for my original operation cost $37,405.52, f. o. b. factory without the equipment on them, with the equipment ready to go in service they cost $5000 each. I paid the manufacturer for those eight busses. Two of the three additional busses were practically the same prices and one, deck and a half bus, cost more. I have over $55,000 invested in busses.

(Unprinted Transcript, 149.)

The dividing line between Ohio and Kentucky is low water mark on the Ohio side at both Portsmouth and Ironton. In passing from Portsmouth to South Portsmouth we go over the Portsmouth, Fullerton, South Portsmouth bridge.

(Unprinted Transcript, 150.)

The Interstate Motor Transit Company had a joint tariff with the L. & L. Bus Line which had to do with passengers going across the Ohio river at South Portsmouth. An injunction suit was brought against The In-

terstate Motor Transit Company and myself, operating The Interstate Motor Transit Company, under the board of directors and the attorneys. I did just what I was advised by the attorneys in the operation. Judge A. Z. Blair was the attorney for The Interstate Motor Transit Company as he is now. He was not my personal attorney. He was attorney for the company, and I have different documents here in regards to what to do, and when to do it, in regard to the injunction, drawn up by Judge Blair. The action was the result of the action of passengers rather than the company. The suit was by Public Utilities Commission. The injunction was to prevent The Interstate Motor Transit Company from carrying passengers in intrastate trade. We had not been carrying passengers in intrastate trade. We kept right on just as we had been. We continued to run to Fullerton just as before. We didn't cease operations on that. We had not carried passengers in intrastate trade. The other company, The Scioto Valley Traction, employed "stool pigeons" riding the busses and they claimed they could do all the different things, things of that kind, we hadn't, we continued right along as we had there before. Judge Blair told me what we could continue to do,—he mapped it out for me, and I did just as he told me to do. The Interstate Motor Transit Company was a corporation and I was its agent. There was no bridge in existence at the time. After the bridge was built the Public Utilities Commission of Ohio gave this same Interstate Motor Transit Company the right to cross there and recross the bridge. Some time before that, the commission

wrote us and Judge Blair, Mr. Ault and myself came up and talked it over with Mr. Huffman, one of the commissioners. Mr. Huffman asked us to discontinue the Fullerton operation until the bridge was completed, that competing lines were complaining and to cease operations until the bridge was finished and then everything would be all right. And we did so. When the bridge was completed we applied and then the Ohio Public Utilities Commission granted The Interstate Motor Transit Company the right to cross the bridge.

(Unprinted Transcript, 153.)

Cross Examination of J. P. Grubb by A. R. Johnson.

My bus operations are those from Columbus to Huntington and I am the sole owner of and interested in The Tri-State Transit Company. It is not a stock company and I have not issued any shares to any person. There is a mortgage on some equipment, but I have issued no interest to any person. Before I applied to the Ohio commission for my license I had not purchased nor contracted for my equipment, but before the hearing I had placed the order for eight busses and an option on a ninth bus. When I placed the order I knew the price of the busses. Since I got my eight busses and after I began operations I purchased three busses from the Studebaker corporations.

(Unprinted Transcript, 154.)

From the Kentucky end of the bridge at Portsmouth for the five days of April, 1928, to and from I hauled 75 for the five days of April. I cannot give you how many

went from Ohio and how many came back from Kentucky separately from this record. It gives the number of passengers in both directions. I check over all of the records. My original receipts will show how many (Unprinted Transcript, 155) passengers went to what we call South Portsmouth, Kentucky, and how many came back from South Portsmouth, for the months of May, June, July, August and September, 1928, but I don't care to produce the original receipts. I could if my counsel thought proper.

(Unprinted Transcript, 155.)

I became interested in The Interstate Motor Transit Company November 20, 1925. I continued to work until January 15, 1928, and was succeeded as manager by Charlie Ault. I continued as stockholder until February 2, 1928, selling my stock to Arthur H. Bannon. I went out as director some time between January 16, 1928, and February 2, 1928.

(Unprinted Transcript, 156.)

The Interstate Motor Transit Company acquired the Cannonball when I was general manager and working man of it. I was not the one man in it. Arthur Bannon, Charlie Ault and Judge Blair had lots to say in it. Bannon became interested in it in June, 1926.

(Unprinted Transcript, 158.)

My busses cost approximately $55,000.00.

(Mr. Raymund: Object, as the matter has been fully covered.)

(Unprinted Transcript, 161.)

I would like to make a correction as to passengers crossing the bridge to and from South Portsmouth, Kentucky, they should be for May, 1928, 527 full and 2 half fares; June, 1928, 744 full and 16 half; July, 1003 full and 31 half; August, 1216 full and 31 half; September, 1315 full and 22 half fares. I am familiar with the new bridge at Portsmouth and lived in Portsmouth when it was built.

After crossing the bridge to South Portsmouth there is the highway up and down on the Kentucky side and a little distance from this road there is a wooded hill. There are houses there and also houses all along there. There is a house on the hill a short distance from the end of the bridge.

(Mr. Carlisle: Objection, because you couldn't expect all the houses in Kentucky to be at the end of the bridge.)

(Unprinted Transcript, 162.)

I can't give now the passengers to and from South Portsmouth, Kentucky, from October 1, to October 15, 1928, for the reason that I have it compiled from October 1, to October 27. I have it by the day. If the court wants it I will give it by the day to them and give the ticket that goes with it. The reason I will not is because I am not giving my records out for a lot of rabbit hunters, but I will give the court any records they want. I have the total number of passengers carried to South Portsmouth and from South Portsmouth, to October 27, 1928, this present month, the total of it, and I have each and every day. If the court wants it, I will give it to the

court, gladly, but I will not give it to rabbit hunters. By rabbit hunters I mean a bunch of competitors. I am willing to submit any facts, figures or statements to the court, but not to a competitive bus line.

(Unprinted Transcript, 163.)

Mr. Grubb: The number of passengers that either got on or off my busses, to or from the Kentucky end of the bridge from October 1, to October 15, 1928, was 451 full fares and 3 half fares; and October 16, to October 27, 1928, both inclusive, 464 full fares and 4 half fares.

Redirect Examination of J. P. Grubb by Mr. Raymund.

The route granted me by the Ohio Utilities Commission runs from Columbus south over United States Route 23 where it connects with Route Number 52 in Portsmouth. They connect in Portsmouth at the Ohio end of the bridge at the intersection of Chillicothe and Second streets. This intersection is, in my judgment, not to exceed 200 feet from low water mark on the Ohio side. This low water mark is the boundary between the states of Ohio and Kentucky.

(Unprinted Transcript, 164.)

I have a permit from the state of Kentucky which gives me the right to operate from South Portsmouth, Kentucky, to and through Portsmouth, Ohio. In my best judgment the total length of the bridge is around 1500 feet.

The Interstate Motor Transit Company has increased the carrying capacity of its busses. They are listed with the Ohio commission as 29 passenger. They are 90

inches wide and weigh around 5800 pounds without any load or equipment, and are from 36 to 38 feet long.

(Unprinted Transcript, 165.)

I operate my smaller busses over identically the same route that The Interstate Motor Transit Company operates thereon. The Interstate Motor Transit Company put on their large busses the first of this month, beginning October 28.

The bridge from Portsmouth to South Portsmouth over the Ohio river is owned by a corporation known as the Fullerton-Portsmouth Bridge Company, Pittsburg office, 302 Penn avenue, Dravo building. It is a toll bridge and we pay toll on all our busses. They have a schedule for different types of vehicles, trucks, wagons, horse and rider and motor vehicles. We pay according to that tariff. The territory from Portsmouth to Huntington, except about 12 or 15 miles between Portsmouth and Ironton, is all built up on the way. It is practically one town, except a few little gaps.

Regarding complaints against The Interstate Motor Transit Company charging that it carried intrastate passengers at Portsmouth, there was an agreement between that company and the Public Utilities Commission at Columbus. The secretary of The Interstate Motor Transit Company, its attorney, and myself, as president and general manager, went to Columbus for a conference in regards to the operations in connection with the L. & L. Bus Line. This bus ran over the ferry between Portsmouth and Fullerton. It had certificate to Maysville, Kentucky, but (Unprinted Trancript, 165) only ran as

far as Garrison, Kentucky, because of the road condition. The Ohio commission asked us to discontinue this connection with the L. & L. bus for a short time until the bridge was completed, and then make our application to cross the bridge to South Portsmouth, and we could in no way be accused by other carriers in any way of a subterfuge.

The two copies of letters handed to me, one dated July 29, 1927, from Blair & Ball, attorneys, to the Public Utilities Commission of Ohio, and one from the Public Utilities Commission of Ohio to Blair & Ball, dated August 1, 1927, concern matters which were brought to my attention when I was manager and president of The Interstate Motor Transit Company. There were conferences between myself and other members of the corporation and attorneys for the corporation in regard to extending the line from Portsmouth, Ohio, to South Portsmouth, Kentucky, as the bridge was nearing completion, and the attorneys were of the opinion that there would be no necessity of making application to the Public Utilities Commission of Ohio, as the extension was wholly within the city of Portsmouth, Ohio, and that the Ohio commission was without jurisdiction, the same as had been the case at Ironton, Ohio. I am conversant with all those matters. Following the exchange of these letters The Interstate Motor Transit Company was granted a permit by the Public Utilities Commission of Ohio, from Portsmouth, Ohio, to South Portsmouth, Kentucky. It was granted and put in operation. The original letter from Blair & Ball is on file with the Public Utilities Commission of Ohio and I have seen it there. The copy of the letter

from the Public Utilities Commission of Ohio to Blair & Ball is on file and in the records of the Public Utilities Commission of Ohio.

Mr. Raymund: We offer the two letters in evidence, marked "Plaintiff's Exhibit 12" and "Plaintiff's Exhibit 13," and are hereto attached.

Mr. Grubb: I was not a party to the complaint referred to in the opinion of the Public Utilities Commission of Ohio, where it granted me the right to run from Columbus to Huntington, but prohibited me from running over the bridge to South Portsmouth, Kentucky. I was not personally a defendant in that complaint.

(Unprinted Transcript, 166.)

The complaint was against the corporation, The Interstate Motor Transit Company, a corporation. I was not at any time made personally a party in that complaint. The Scioto Valley Railway & Power Company filed the complaint.

(Unprinted Transcript, 167.)

J. P. Grubb Recalled for Further Cross Examination by A. R. Johnson.

Mr. Grubb: There was subpoena in my mail box, and the state law says that I would be arrested if I started this bus line, I was threatened with arrest in this way if I did start operation in the state of Kentucky there would be a fine of $10 to $1000 a day, when they revoked my certificate. There is a letter from them. The state of Kentucky said that if I did operate I would be subject

to a fine. That was a letter received from the Kentucky department. Nobody in Ohio threatened to arrest me because I hadn't begun operation.

Redirect Examination by Mr. Raymund.

Mr. Grubb: I knew that persons were continually being arrested for violating the state highway laws of the state. That is the law, plain.

(Counsel for defendant: We move to strike out as incompetent and irrelevant.)

Mr. Grubb: The order did actually prohibit me from operating over this bridge and I knew that it did, sure.

(Unprinted Transcript, 176.)

Charles Noel, Being Sworn, Testified as Follows for Defendants.

Direct Examination by A. Z. Blair.

Charles Noel: My name is Charles Noel, residence Portsmouth, Ohio, and for five years have been county surveyor, I have made measurements concerning the bridge between Portsmouth and the Kentucky shore within a week. The distance from the south end of the bridge to the C. & O. depot is 2000 feet. There were 37 houses on each side of the road. I learned that 104 people lived in these houses, I also counted 12 houses around the depot in which 48 people live. From the Kentucky end of the bridge up-river to the Davis hotel in Fullerton is 5825 feet. I did not count the houses along the road. I investigated the population of Fullerton and three or four people told me there were in the neighborhood of 1600. The distance from the ferry landing in Fullerton

to the Kentucky end of the bridge is 4600 feet. There is another ferry in operation about a mile above the Fullerton ferry. I judge it is about 18 miles from the south end of the bridge to Greenup, Kentucky.

(Unprinted Transcript, 171.)

I made measurements with regard to the bridge. From low water mark on the Ohio side to the south end of the bridge is 1612 feet. The entire length of the bridge is 2324 feet from the junction of Chillicothe street and Second street to the south end in Kentucky and from said junction to low water mark on the Ohio side is 712 feet.

Cross Examination by Mr. Carlisle.

Charles Noel: The road from Portsmouth east to Ironton, up-river is a Federal Aid road, and it intersects United States Highway Number 23. These roads connect right at the north end of the bridge. The approach to the bridge is all improved highway, wide and up to date, I don't know about bus lines operating across the bridge. There is a Kentucky highway on the Kentucky shore that runs through Fullerton and on past the C. & O. depot. It runs all along there. The houses I mentioned are along the highway. The bus terminal is at the end of the bridge and the C. & O. railway depot is at South Portsmouth. The railway have a depot there. The railroad is quite a considerable system. Up to September, 1927, or about that date, there was no bridge between Portsmouth and the Kentucky shore. I was county engineer when it was being built. There was need for the bridge and it is used by the public. Outside of the ferries the bridge is the only gateway for some considerable dis-

tance up and down the Ohio river. The name of the county in Kentucky crossing from Portsmouth is Greenup county and it is a pretty good sized county, I don't know what the bridge cost, I have lived in this county practically all my life. For many years there was prior to building this bridge considerable talk on the part of the public desiring a bridge here, it was finally ended with the building of the bridge.

Redirect Examination by A. Z. Blair.

Charles Noel: Before the bridge was built there was a C. & O. ferry, the ferry from Market street to the Kentucky side and the Fullerton ferry. The Fullerton ferry is there yet. On the Kentucky side they are improving the highways but I am not familiar with the Kentucky highway system.

Recross Examination by Mr. Carlisle.

Charles Noel: There are roads that lead from Fullerton, improved roads, they are working on them now.

(Unprinted Transcript, 172.)

Deposition of Griffin Kelly, on Behalf of Defendants, Taken at Frankfort, Kentucky, May 7, 1928, and Filed May 10, 1928.

Direct Examination by Mr. Ball.

Griffin Kelly: My name is Griffin Kelly, age 59, residence Franklin county, Kentucky. Am commissioner of motor transportation of the state of Kentucky and have been for two years. Under the Kentucky bus law enacted by the general assembly of Kentucky in 1926, as such commissioner I have authority to grant or refuse

certificates. The paper marked as "Exhibit A" is a certified copy of such a certificate, or permit, which my department issued to The Tri-State Transit Company, James P. Grubb, manager. The certificate was granted January 30, 1928, and there has been no changes in the same. Should The Tri-State Transit Company or James P. Grubb fail to operate from Portsmouth, Ohio, to South Portsmouth, Kentucky, and thence to Portsmouth, Ohio, the certificate would be vacated as to that part.

(Mr. Raymund: Objects as incompetent, irrelevant and immaterial.)

Such failure would not affect the rest of the certificate.

(Mr. Raymund: Same objection and for the same reason.)

Cross Examination by Mr. Raymund, Attorney for Plaintiff.

Mr. Kelly: The Cannonball Transportation Company operates from Portsmouth, Ohio, to South Portsmouth, Kentucky, and return. They were granted a permit to do this about April 25, 1928. The Interstate Motor Transit Company has no certificate to (Unprinted Transcript, 177) operate between Portsmouth, Ohio, and South Portsmouth, Kentucky.

(Objected to by defendant.)

It has a certificate from Charleston, West Virginia, to Columbus, Ohio, via Ashland and Russell, Kentucky, Number 2053, granted December 27, 1927, for the year 1928. The road between Russell and Greenup, Kentucky, is a very good road and the road between Greenup and

South Portsmouth can be operated over in dry weather, but as to wet weather, I have no report on that.

(Objected to by defendant.)

(Unprinted Transcript, 178.)

(Duplicate)

Copy.

Exhibit "A."

Commonwealth of Kentucky
Department Motor Transportation
1928
Interstate Passengers Only

Permit No. 2204 Frankfort, Ky., January 30, 1928.

Tri-State Transit Company (James P. Grubb, manager) having complied with the law and regulations of the commissioner, a certificate of convenience and necessity to operate a motor bus line is hereby granted to said company. From—Huntington, West Virginia. To—Columbus, Ohio; via Kenova, W. Va., Catlettsburg, Ky.; Ashland, Ky.; Russell, Ky.; Ironton, Ohio; Portsmouth, Ohio; to South Portsmouth, Ky., to Portsmouth, Ohio; to Columbus, Ohio, through the following counties: Boyd and Greenup county, Kentucky. Said operation to begin immediately. Said bus line is authorized to use a sufficient number of busses of the proper seating capacity to maintain the schedule as outlined on the reverse side of this certificate. If said operation is not started within sixty (60) days (the time specified by law) from date said operation is specified to begin in this certificate, same shall become null and void.

(Seal) Griffin Kelly,
Commissioner of Motor Transportation.

(Reverse Side of Certificate)

Schedule

Leave Arrive Fare

As per printed schedule attached.

This schedule is subject to change by the commission of motor transportation of the state of Kentucky if it conflicts with any other schedule over the same route. The within permit is granted to handle interstate passengers only, and any violation of this provision will automatically revoke this permit.

Griffin Kelly, Commissioner.

I hereby certify that the foregoing is a true and correct copy of the permit granted to The Tri-State Transit Company on file in the department of motor transportation of the state of Kentucky.

James E. Cantrill, Assistant Commissioner.

(Unprinted Transcript, 179.)

Narrative Statement of Plaintiff's Exhibit No. I, Which Exhibit Contains the Testimony Adduced at the Hearing on the Application of J. P. Grubb, Before the Public Utilities Commission of Ohio, at 10 A. M. March 13, 1928, Honorable William Klinger, Chairman, J. W. Huffman and Frank B. Maullar, Composing Said Commission, Sitting.

Morning Session, Tuesday, March 13, 1928.

Beginning on page 6 of said Plaintiff's Exhibit No. I.

James P. Grubb, Being Duly Sworn, Testified as Follows:

Examined by Mr. Carlisle.

My name is James P. Grubb, residence, Portsmouth, Ohio, having lived there more or less all the time since 1914. I am seeking an interstate certificate to carry on an interstate business under the trade-name of Tri-State Transit Company.

I filed this map with my application and my route just described is indicated by a red line. I know United States Highways Nos. 23 and 52 are Federal Aid roads.

I propose to operate busses carrying passengers. There will be eight Studebaker 17 pass. parlor cars, seven used and one in reserve. There will be seven trips in each direction daily beginning at 6 o'clock and every two hours on the even hour until 6 p. m.

(Unprinted Transcript, 180.)

I propose to carry interstate passengers only; passengers whose ride is from one state into the other, or a

passenger whose ride is through one state into another; passengers traveling from one state into the other. I will not carry any passengers whose complete ride is in Ohio.

I am willing to comply with all the statutes and laws and regulations in Ohio, so long as such statutes and regulations in Ohio are not a burden on interstate commerce, and that is the way I apply. I will pay taxes on my vehicles and comply with the laws of Ohio in that respect.

The paper writing handed me is a sworn statement of my financial standing as of March 10, 1928. The signature is mine and the statement is correct to the best of my knowledge. (The statement marked Applicant's Exhibit "H" admitted in evidence.)

Chairman Klinger: I notice counsel ask the witness a question how long he would comply with the rules and regulations imposed by the Utilities Commission. You of course understand that as long as the impositions and burdens are no different from those imposed upon intrastate service you are expecting to comply with them?

Grubb, the Witness: Yes, sir.

Chairman Klinger: Is that your understanding?

The Witness: Yes, sir.

Chairman Klinger: I didn't know whether there was any special reservation contemplated by the question or not.

Mr. Carlisle: I just wanted to bring it fully within the decision in the Buck case.

Cross Examination by Blair.

My business prior hereto was operating motor busses, beginning with The Cannon Ball Transportation Company from Portsmouth, Ohio, to Huntington, West Virginia (Unprinted Transcript, 181), and then later with The Interstate Motor Transit Company from Columbus, Ohio, to Charleston, West Virginia, and The Cannon Ball Transportation Company from Chillicothe, Ohio, to Huntington, West Virginia. I began with the Cannon Ball April 1, 1923, and was with it until December 9, 1924, and then was out of business until the fall of 1926. I began with the Interstate on November 12, 1926, and remained with it until January 15, of this year. I was manager and president all the time with the exception of a few months. I was general manager of both lines, also a director and stockholder, owning a substantial amount of the stock.

As manager I operated these lines to the best of my ability and gave them my exclusive time and attention. As to the schedules, I worked out most of them and then they were submitted to the other members of the company to act on. We made numbers and numbers of changes. The changes were minor ones and the schedules were fair. My previous operation of these two lines has given me special knowledge as to the travel over those lines and the requirements.

(Unprinted Transcript, 182.)

From Plaintiff's Exhibit No. 1.

Afternoon Session, Tuesday, March 13, 1928, Before the Public Utilities Commission of Ohio, Pages 35 to 41, Both Inclusive.

Afternoon Session, Tuesday, March 13, 1928.

Mr. Blair: Is the commission ready to proceed?

Chairman Klinger: Yes.

Mr. Blair: May it please your Honors, as we understand, the commission is holding that you have no jurisdiction or authority to consider any evidence tending to prove the good faith of the applicant, of his conduct heretofore, and of his ability financially to operate, of the necessity or convenience of the operation or any of these matters; that is our understanding of the holding of the commission; not that you are not willing to do it, but that you do not have the jurisdiction to do it on the ground that it is for interstate transportation solely.

Chairman Klinger: It is a little broader than you have been stating it. You can inquire as to his financial ability.

Mr. Blair: Otherwise the statement is correct, is it?

Chairman Klinger: Yes.

Mr. Blair: Then, may it please your Honors, we realize the seriousness of the questions raised. We would like to have the commission hold any order up for, say, four or five days and we will make the proper application to the proper court where these questions can be properly taken care of. We do not want the commission to make an order prior to that time so that the court may come

back and say that the commission has exercised its discretion on (Unprinted Transcript, 183) these matters; and it will give us four or five days so that we can make the application, and we will make it.

Commissioner Maullar: No, we would not grant—it would not be upon our discretion; we will make the grant.

(Unprinted Transcript, 184.)

Chairman Klinger: Just a minute; my understanding of their position is this; they wish to bring an action, say in the federal court, to enjoin us from granting this certificate, they want to set up the reasons that they want that injunction granted, and then it will appear that we refused to consider those reasons on the theory that we are without jurisdiction.

Mr. Blair: That is it.

Chairman Klinger: And they want time enough so that they can get their proceeding started in the court so as to hold up the granting of the certificate. And of course we realize that they will have to give bond.

Mr. Carlisle: Bond for what?

Chairman Klinger: Any damage that may result to your client.

Mr. Carlisle: But we do not know in advance which way your Honors are going to rule officially.

Chairman Klinger: I understand, but they are anticipating that we will grant it because there is no reason why we should not.

Mr. Carlisle: Then why make it a moot case?

Chairman Klinger: Well, that was our thought, that we should grant it.

Mr. Blair: We may say we have the evidence here to show, as we think, the fact of there being no necessity or convenience for this operation; and further to show, that the applicant, while operating The Interstate Motor Transit Company, has in two different courts been enjoined from illegal and unwarranted acts, and those injunction suits are still pending, with temporary restraining orders still in force; one in West Virginia and one in Ohio; one in this county.

Mr. Carlisle: Those are against the company; not against this man at all.

(Unprinted Transcript, 186.)

Mr. Blair: We claim the application of the defendant is not made in good faith; that he is not financially able to carry on this transaction; that he has heretofore been engaged in getting these certificates and selling them and making money out of them, and that is his sole purpose in this case. We believe that the evidence that we have will show those facts.

Mr. Carlisle: If your Honor please, we absolutely deny that.

Mr. Blair: Just a minute; that the records of The Interstate Motor Transit Company operated by him show that from July, 1927, until December, 1927, there was a gradual losing of patronage in that the passengers and the earnings of the bus company from its operation gradually decreased, although in the latter part of September or the first of October, under an order made by this commission, it was permitted to go to South Portsmouth, where it increased its income something like $3000.00 a

month, and notwithstanding that the income from July, 1927, to December, 1927, dropped from nineteen thousand and some dollars per month to fifteen thousand and some dollars.

Chairman Klinger: I do not know as it would make any difference.

Mr. Blair: I am only making the statement, and we will get the petition up promptly.

(Unprinted Transcript, 187.)

Chairman Klinger: I don't know as we are justified in modifying or changing our method of procedure here for either the advantage or disadvantage of any of the parties that may appear before us.

In a situation of this kind it has been the practice of this commission to make our order at once, to go into effect on a definite date in the future. We are willing to do that, to make our order today to go into effect the first day of April, if that is necessary, or the fifteenth of this month—say the first of April.

Commissioner Maullar: That would make the applicant here, if granted a certificate, pay for three-quarters of the year. If it becomes effective today he would be in for a full year's time.

Mr. Blair: Well, will that order contain the statement then that it is made on the theory that you have no right to pass on these matters?

Chairman Klinger: No. The order is just made on the record before us, put in here on both sides. We grant him a certificate to engage in interstate service as prayed for to become effective the first of April.

Mr. Blair: Well, we understand that the granting of it is on the proposition that you have no jurisdiction in the matter?

Chairman Klinger: We have stated, and we will now state, that we will not permit the introduction of evidence along that line for the reason that we have no jurisdiction. That will take care of your matters fully.

Mr. Blair: All right.

(Unprinted Transcript, 188.)

Plaintiff's Exhibit "8."

Portsmouth, Ohio, January 16, 1928.

Mr. Arthur Bannon,
Mr. Chas. M. Ault,
Portsmouth, Ohio.

Gentlemen:

As I have resigned as gen. mgr. of the Cannon Ball Transportation Co. and The Inter State Motor Transit Co.

I still remain president of the above companies and would like to resign the above office as president of both the companies and would like to do this as early as posibaly.

But so long as I fill this office I will fullfil the office as you have me to and continue on the payroll as set out in the by-laws of the above company which the salery of the president of the Inter State salery $2500.00, president of the Cannon Ball $1800.00 per year makeing a total of $4300.00 per year.

Also just as soon as Mr. Smith of The Inter State and

Mr. Taylor of the Cannon Ball have their books closed for the year 1927. I will go over with them and make good dollar for dollar the shortages which may not check out. Also settle eny differences between my drawing account and salerys and the cash which I have loaned and takeing credit for from the companies.

I will be on hand at eny time you can relive me from the office as president of the above companies.

Also to go over and check up 1927 business with Mr. Smith and Taylor and take care of eny shortages which is not accounted for for 1927 business.

Yours verry truly

(Copy) Jas. P. Grubb.

(Unprinted Transcript, 192.)

Plaintiff's Exhibit "12."

Blair & Ball

Portsmouth, Ohio

July 29, 1927.

Public Utilities Commission,
Columbus, Ohio.

Attention: Mr. Huffman.

Gentlemen:

We have heretofore conferred with you in reference to the extending of the Interstate Motor Transit Company's line so as to cross the river at Portsmouth, Ohio, to South Portsmouth, Kentucky, and return. It was then understood that we were to delay application for this extension until the bridge now being constructed across the Ohio river between Portsmouth, Ohio, and Fullerton, Kentucky, was completed and ready for travel. The bridge will be completed very shortly.

We are calling your attention to the case of the Cannon Ball Transportation Company application to extend its line from Park and Second streets in Ironton, Ohio, to the state line between Ohio and Kentucky, which application was filed in your office January 2, 1925, and denied by the commission on the ground of its not having jurisdiction over the part covered by the extension, the same being entirely within the municipal corporation of Ironton. The Cannon Ball Company prosecuted error to the Supreme Court, being Cause Number 19328 in said court, and was denied December 15, 1925, 113 Ohio State, page 677, the syllabus of which is as follows:

"Where an Ohio municipality is located upon the geographical border of the state, and a motor transportation company desires to operate a motor service from a point within such city to such geographical border, the regulation of such service within such municipality rests with the municipal authorities, and the Public Utilities Commission has no jurisdiction to entertain an application for a certificate of convenience and necessity."

Under the holding in this case and the facts in the extension contemplated as above set forth, it is suggested to us that your commission will have no jurisdiction to make an order in reference thereto.

Will you kindly take the matter up and advise us by early mail. If, for any reason, the matter should be directed to your commission, we desire to do so, but we wish to avoid the expense to our clients in both time and money in doing the vain thing.

Very truly yours,

Blair and Ball, Attorneys.

Per Albian and Blair.

(Unprinted Transcript, 194.)

Plaintiff's Exhibit "13."

Copy.

August 1, 1927.

Blair & Ball,
Attorneys at Law,
First National Bank Bldg.,
Portsmouth, Ohio.

Att.: A. Z. Blair.

Gentlemen:

Replying to your communication of July 29th, relative to an extension of the Interstate Motor Transit Company lines, across the Ohio river at Portsmouth, beg to advise that insofar as the commission has been informed, it finds that this operation is within the jurisdiction of the Public Utilities Commission.

Should this proposed operation be only to the Ohio-Kentucky state line, and entirely within the city of Portsmouth and not an extension of the existing route, the commission is of the opinion that it does not have jurisdiction. However, if the proposed operation extends across the state line and the operation becomes interstate, the commission is of the opinion that it does have jurisdiction.

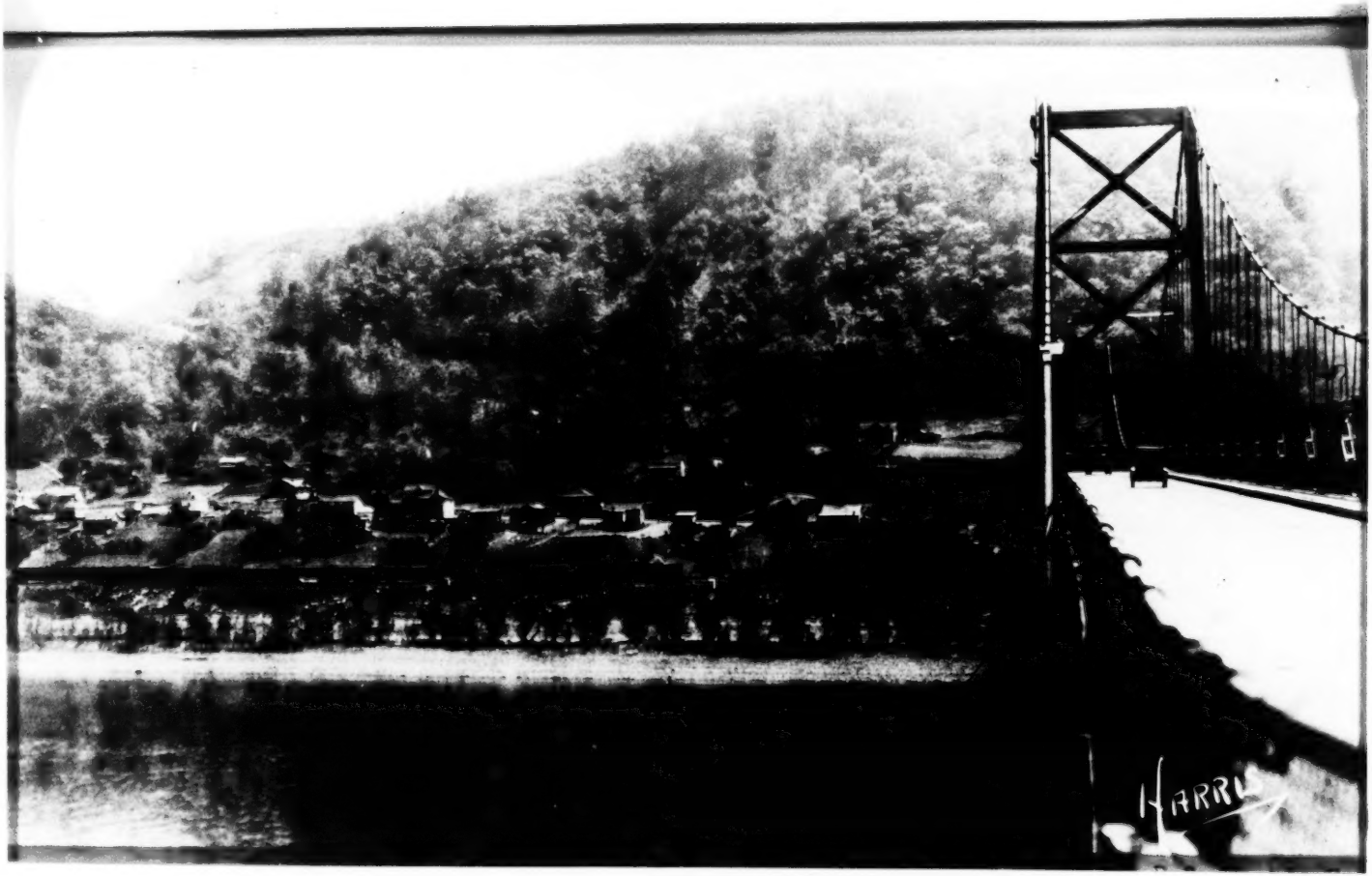
Should there be an attempt on the part of the Interstate Motor Transit Company to add buses to its equipment for the purpose of interstate operation, there is no doubt concerning the authority of the commission.

I would advise you to submit this case to the commission on its merits upon application and the commission will then decide if the case should be set for hearing.

Sincerely yours,
The Public Utilities Commission of Ohio.
Commissioner.

JWH:RC

(Unprinted Transcript, 195.)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Plaintiff's Exhibit "O."

Finding and Order.

This day after full hearing, due notice of the time and place of which was given by publication and otherwise as provided by law, this matter came on for consideration upon the application of the said The Interstate Motor Transit Company to amend certificate of public convenience and necessity to operate a motor transportation company, carrying as a common carrier, in the city of Portsmouth over the regular route following, to-wit:

To amend the route covered in its Certificate Number 2381, issued on the ninth day of June, 1925, by the Public Utilities Commission of Ohio, for busses traveling south, by extending and changing that part of said route beginning at the north corporation line of the city of Portsmouth, being the north terminus of Chillicothe street in said city; thence with said Chillicothe street south to the north end of the Portsmouth, Ohio-South Portsmouth, Kentucky, bridge across the Ohio river; thence over said bridge to the south line of said city of Portsmouth, being the line between the states of Ohio and Kentucky; thence continuing over said bridge and to the bus terminal at South Portsmouth, Kentucky. Returning over said bridge from Kentucky to the line of the state of Ohio and Kentucky, being the south line of said city of Portsmouth; thence over said bridge to Second street; thence west on Second street to Washington street; thence north on Washington street to Fifth street to its intersection with Chillicothe and Gallia streets; thence east to the

east corporation line of said city of Portsmouth, Ohio, over its present route.

And for busses traveling north, by extending and changing that part of said route beginning at the intersection of Gallia, Chillicothe and Fifth streets in the city of Portsmouth, Scioto county, Ohio; thence west on Fifth street to Washington street; thence south on Washington street to Second street; thence east on Second street to the north end of the Portsmouth, Ohio-South Portsmouth, Kentucky, bridge across the Ohio river; thence over said bridge to the south line of said city of Portsmouth, being the line between the states of Ohio and Kentucky; thence continuing over said bridge and to the bus terminal at South Portsmouth, Kentucky. Returning over said bridge from Kentucky to the line of the states of Ohio and Kentucky; being the south line of said city of Portsmouth; thence over said bridge to Second street; thence west on Second street to Washington street; thence north on Washington street to Fifth street; thence east on Fifth street to bus station; thence west on Fifth street to Washington street; thence north on Washington street to Ninth street; thence east on Ninth street to Chillicothe street; thence north on Chillicothe street, over present route.

Said amendment and alteration of said route as amended and as existing being entirely located in the city of Portsmouth, Scioto county, Ohio, insofar as it affects its route in the state of Ohio.

Granted for interstate operation only.

Dated at Columbus, Ohio, this twenty-first day of September, 1927.

(Unprinted Transcript, 213.)

Plaintiff's Exhibit A-1.

Sec. 614-2. The following words and phrases used in this chapter unless the same is inconsistent with the text, shall be construed as follows:

The term "commission" when used in this act, or in chapter one, division two, title three, part first of the General Code and the acts amendatory or supplementary thereto means "the Public Utilities Commission of Ohio."

The term "commissioner" means one of the members of such commission.

When engaged in the business of carrying and transporting persons or property, or both as a common carrier, for hire, in motor propelled vehicles of any kind whatsoever, under private contract or for the public in general, over any public street, road or highway in this state, except as otherwise provided in Section 614-84, is a motor transportation company;

Sec. 614-2a. The term "public utility" as used in this act, shall mean and include every corporation, company, co-partnership, person or association, their lessees, trustees or receivers, defined in the next preceding section, except private contract carriers and except such public utilities as operate their utilities not for profit, and except such public utilities as are, or may hereafter be owned or operated by any municipality, and except such utilities as are defined as "railroads" in Sections 501 and 502 of the General Code, and these terms shall apply in defining "public utilities" and "railroads" wherever used in chapter one, division two, title three, part first of the

General Code and the acts amendatory or supplementary thereto or in this act.

Sec. 614-67. Whenever the commission shall be of the opinion that any public utility or railroad has failed, omitted or neglected to obey any order made with respect thereto, or is about to fail or neglect so to do, or is permitting anything, or about to permit anything contrary to, or in violation of law, or an order of the commission, duly authorized under the provisions of this act, the attorney general, upon the request of the commission, shall commence and prosecute such action, actions, or proceedings in mandamus or by injunction in the name of the state, as may be directed by the commission, against such public utility or railroad, alleging the violation complained of and praying for proper relief, and in such case the court may make such order as may be proper in the premises.

Sec. 614-84. (a) The term "motor transportation company," when used in this chapter, means every corporation, company, association, joint stock association, person, firm or co-partnership, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any motor propelled vehicle not usually operated on or over rails, used in the business of transportation of persons or property, or both, as a common carrier, for hire, under private contract or for the public in general, over any public highway in this state; provided, however, that the term "motor transportation company" as used in this chapter shall not include any private contract carrier, as defined

in Section 614-2, and shall not include, any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, in so far as they own, control, operate, or manage a motor vehicle or motor vehicles used for the transportation of persons or property, or both, and which are operated exclusively within the territorial limits of a municipal corporation, or within such limits and the territorial limits of municipal corporations immediately contiguous thereto, or in so far as they own, control, operate or manage taxicabs, hotel busses, school busses or sightseeing busses, or in so far as they own, control, operate or manage motor propelled vehicles, the use of which is for the private business of the owners and the use of which for hire is casual and disassociated from such private business.

Sec. 614-85. No motor transportation company, its lessees, trustees, receivers or trustees appointed by any court whatsoever, shall operate any motor propelled vehicle for the transportation of persons or property, or both, for hire, on any public highway in this state except in accordance with the provisions of this chapter.

Sec. 614-86. The Public Utilities Commission of the state of Ohio is hereby vested with power and authority to supervise and regulate each such motor transportation company in this state; to fix, alter and regulate rates; to regulate the service and safety of operation of each such motor transportation company; to prescribe safety regulations, and designate stops for service and safety on established routes; to require the filing of annual and

other reports and of other data by such motor transportation companies; to provide uniform accounting systems; and to supervise and regulate motor transportation companies in all other matters affecting the relationship between such companies and the public to the exclusion of all local authorities in this state, except as hereinafter otherwise provided. The commission, in the exercise of the jurisdiction conferred upon it by this chapter, shall have the power and authority to prescribe rules and regulations affecting such motor transportation companies, notwithstanding the provisions of any ordinance, resolution, license or permit heretofore enacted, adopted or granted by any incorporated city or village, city and county, or county, and in case of conflict between any such ordinance, resolution, license or permit, the order, rule or regulation of the Public Utilities Commission shall, in each instance prevail; provided that such local subdivisions may make reasonable local police regulations within their respective boundaries, not inconsistent with the provisions of this chapter; provided, further, that no motor transportation company operating under a certificate of convenience and necessity, shall carry persons whose complete ride is wholly within the territorial limits of a municipal corporation, or within such limits and the territorial limits of municipal corporations immediately contiguous thereto, except with the consent of such municipal corporation or municipal corporations.

Sec. 614-89. In all respects in which the Public Utilities Commission has power or authority under this act applications and complaints may be made and filed with

such commission, processes issued, hearings held, opinions, orders and decisions made and filed, petitions or re-hearings filed and acted upon, **and all proceedings before the Supreme Court of this state considered and disposed of by such court in the manner, under the conditions and subject to the limitations and with the effect specified in the sections of the General Code governing the supervision of other public utilities by the commission.**

Sec. 614-100. Every officer, agent or employe of any corporation, and every other person who violates or fails to comply with or who procures, aids or abets in the violation of any provision of Sections 614-84 to 614-102, inclusive, of the General Code, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement, or any part or provision thereof, of the Public Utilities Commission, or who procures, aids or abets any corporation or person in his failure to obey, observe or comply with any such order, decision, demand or regulation, or any part or provision thereof, shall be deemed guilty of a misdemeanor and, upon conviction, shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

Sec. 614-101. Neither Sections 614-84 to 614-102, inclusive, of the General Code, nor any provisions thereof, shall apply or be construed to apply to commerce with foreign nations or countries, or among the several states of this Union, except in so far as the same may be permitted under the provisions of the Constitution of the United States and the acts of congress.

(Unprinted Transcript, 214.)

Plaintiff's Exhibit A-2.

Section 2. Article IV, of the Constitution of the State of Ohio.

Sec. 2. The Supreme Court shall, until otherwise provided by law, consist of a chief justice and six judges now in office in that court shall continue therein until the end of the terms for which they were respectively elected, unless they are removed, die or resign. A majority of the Supreme Court shall be necessary to constitute a quorum or to pronounce a decision, except as hereinafter provided. It shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this state, in cases of felony on leave first obtained, and in cases which originated in the courts of appeals, and **such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law.** It shall hold at least one term in each year at the seat of government, and such other terms, there or elsewhere, as may be provided by law. The judges of the Supreme Court shall be elected by the electors of the state at large for such term, not less than six years, as may be prescribed by law, and they shall be elected, and their official term shall begin, at such time as may now or hereafter be fixed by law. Whenever the judges of the Supreme Court shall be equally divided in opinion as to the merits of any case before them and are unable

for that reason to agree upon a judgment, that fact shall be entered upon the record and such entry shall be held to constitute an affirmance of the judgment of the court below. No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void. In cases of public or great general interest the Supreme Court may, within such limitation of time as may be prescribed by law, direct any Court of Appeals to certify its record to the Supreme Court, and may review and affirm, modify or reverse, the judgment of the Court of Appeals. All cases pending in the Supreme Court at the time of the adoption of this amendment by the people, shall proceed to judgment in the manner provided by existing law. No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the Supreme Court. (Adopted September 3, 1912.) **(Boldface ours.)**

Sec. 502. This chapter shall apply to the transportation of passengers and property **between points within this state**, to the receiving, switching, delivering, storing and handling of such property, and to all charges connected therewith, including icing charges and mileage charges, to all railroad companies, sleeping car companies, equipment companies, express companies, car companies, freight and freight line companies, to all associations of persons, whether incorporated or otherwise, which do business as common carriers, upon or over a

line of railroad within this state, and to a common carrier engaged in the transportation of passengers or property wholly by rail or partly by rail and partly by water or wholly by water. In addition thereto the provisions of this act shall apply to the regulation of any and all other duties, services, practices and charges, of the railroad company, incident to the shipping and receiving of freight, which are proper subjects of regulation, **excepting only, that they shall not apply to the regulation of commerce with foreign nations, and among the several states, and with the Indian tribes.**

(Unprinted Transcript, 215.)

Stipulations as to Blue Print for Printed Record.

In lieu of the road maps marked in the transcript as Plaintiff's Exhibit "C", it is hereby stipulated by counsel for appellant and appellees that a blue print sketch map showing the part of the route granted and the part of the route prohibited be made and included within the printed record by the clerk of the Supreme Court of the United States, and the same be designated in the designations of the appellant.

It is further stipulated that said blue print map be substituted for said road map and be marked as Plaintiff's Exhibit "C" in said printed record.

It is further stipulated that said blue print map be

and the same is hereby approved by counsel for appellant and appellees.

.....

The Portsmouth Public Service Company by Miller & Searl its attorneys.

The Ohio Valley Bus Company by A. R. Johnson its attorney.

The Ohio Valley Electric Railway Company by A. R. Johnson its attorney.

The Interstate Motor Transit Company by D. H. Armstrong and Blair & Ball its attorneys.

The Cannonball Transportation Company by D. H. Armstrong and Blair & Ball its attorneys.

The Public Utilities Commission of Ohio by T. J. Herbert, attorney.

J. P. Grubb, appellant by John F. Carlisle and F. M. Raymund, attorneys.

(Unprinted Transcript, 219.)

Plaintiff's Exhibit "H."

A certificate of public convenience and necessity is hereby granted J. P. Grubb db/as The Tri-State Transit Company a motor transportation company under the laws of Ohio, whose office or place of business is at Portsmouth, Ohio, to operate over the route and by the schedules heretofore approved by this commission, or which may hereafter be approved by this commission, said route being as follows:

Leave Columbus, Ohio, from terminal located on East Rich street, thence via Rich street to South Third street;

thence to Whittier street; thence to High street; thence to corporation line; thence via United States Highway No. 23 to the county line of Franklin and Pickaway counties; thence via same highway to and through South Bloomfield and Circleville to the county line of Pickaway and Ross counties; thence via the same highway to and through Hopetown to the corporate line of Chillicothe; thence via Bridge street to Water street; thence to Paint street and thence to corporate line; thence via United States Highway No. 23 to and through Massieville and Alma to the county line of Ross and Pike counties; thence via same highway to and through Waverly, Piketon, Sargents and Wakefield to the county line of Pike and Scioto counties; thence via same highway to and through Portsmouth and New Boston and, via United States Highway No. 52 to and through Wheelersburg,, Franklin Furnace and Haverhill to the county line of Scioto and Lawrence counties; thence via same highway (which is also State Route No. 7) to and through Hanging Rock to the corporation line of Ironton; thence via Second street to bridge, crossing river to Russell, Kentucky (final destination, Huntington, West Virginia), and reverse.

Granted for interstate operation only.

Conditioned that local subdivisions may make reasonable local police regulations within their respective boundaries not inconsistent with the provisions of Sections 614-84 to 614-102 of the General Code of Ohio.

and with the following equipment: Eight 17 passenger Studebakers.

Said J. P. Grubb db/as The Tri-State Transit Com-

pany shall so operate upon the time and rate schedules now or hereafter filed with and approved by this commission and displayed at the stations, and in each motor bus of said company.

Witness the signature and seal of the commission at Columbus, Ohio, this second day of April, 1928.

(Unprinted Transcript, 228.)

Plaintiff's Exhibit "I."

Department of Treasurer of State.

P. U. C. O. No. 2840.

To the Public Utilities Commission:

Received from J. P. Grubb db/as The Tri-State Transit Co..... $840.00

Portsmouth, Ohio

to the credit of the fund for the administration of the provisions of Sections 614-84 to 614-102 G. C. and for the maintenance and repair of highways in accordance with Section 614-94 G. C.

Date ....., 192... Cashier.

Tax computed from April 1, 1928.

Received April 23, 1928.

Ohio State Treasury.

Plaintiff's Exhibit "J-1."

Department of Motor Transportation
Office of the Commissioner
Frankfort, Kentucky

January 23, 1928.

Mr. James P. Grubb,
Portsmouth, Ohio
Dear Sir:

Replying to your letter of January twentieth, in regard to interstate bus line from Columbus, Ohio to Huntington, West Virginia, please be advised that the only thing necessary in securing an interstate line is to comply with the state law by paying all fees required by the state. If this is done, the commissioner has no discretion in the matter but must grant interstate permits.

Please fill out the enclosed blank and return to this office. Upon receipt of this a date will be set immediately for a hearing of the same and you will be notified.

You must comply with the law by notifying all parties operating over said route or any steam or electric railway paralleling same, that you have filed application. All notices must be by registered mail and a copy of each notice filed with this department.

Yours very truly,
Signed "Griffin Kelly"
Commissioner.

(Unprinted Transcript 229.)

Plaintiff's Exhibit "J-2."

Department of Motor Transportation
Office of the Commissioner
Frankfort, Kentucky

January 30, 1928.

Mr. James P. Grubb, Manager,
Tri-State Transit Company,
2309 Mickleweight Road,
Portsmouth, Ohio

Dear Sir:

Enclosed please find interstate permit No. 2204.

Just as soon as possible kindly send us description of the cars together with motor numbers, &c., and check to cover same.

Yours very truly,
Signed: "Griffin Kelly"
Commissioner.

Plaintiff's Exhibit "J-3."

Commonwealth of Kentucky
Department of Motor Transportation
1928
Interstate Passengers Only

Permit No. 2204

Frankfort, Ky., January 30, 1928.

Tri-State Transit Company (James P. Grubb, manager) having complied with the laws and regulations of the commissioner, a certificate of convenience and necessity to operate a motor bus line is hereby granted to said company from Huntington, West Virginia to Columbus,

Ohio; via Kenova, W. Va.; Catlettsburg, Ky.; Ashland, Ky.; Ironton, Ohio; Portsmouth, Ohio; to South Portsmouth, Ky. to Portsmouth, Ohio; to Columbus, Ohio, through the following counties: Boyd and Greenup county, Kentucky.

Said operation to begin immediately.

Said bus line is authorized to use a sufficient number of busses of the proper seating capacity to maintain the schedule as outlined on the reverse side of this certificate. If said operation is not started within sixty (60) days, (the time specified by law) from date said operation is specified to begin in this certificate, same shall become null and void.

Signed: "Griffin Kelly"
[Seal.] Commissioner of Motor Transportation.

(Unprinted Transcript, 230.)

Plaintiff's Exhibit "J-4."

Schedule

Leave Arrive Fare

As per printed schedule attached.

This schedule is subject to change by the commissioner of motor transportation of the state of Kentucky if it conflicts with any other schedule over the same route. The within permit is granted to handle interstate passengers only, and any violation of this provision will automatically revoke this permit.

Signed: "Griffin Kelly"
Commissioner.

Plaintiff's Exhibit "J-5."

Department of Motor Transportation
Office of the Commissioner
Frankfort, Kentucky

March 12, 1928.

Mr. James P. Grubb
Portsmouth, Ohio
Dear Sir:

Replying to your letter of March tenth, in which you request that the time to begin operation on permit No. 2204 be extended twenty days, you will please be advised that you are hereby granted an extension of time until April twentieth.

Yours very truly
Signed: "Griffin Kelly"
Commissioner.

Plaintiff's Exhibit "J-6."

April 2nd, 1928.

Mr. James P. Grubb, Mgr.
Tri-State Transit Company
Portsmouth, Ohio.
Dear Sir:

You are hereby notified that I have today revoked your inter-state Permit No. 2204 to operate a motor bus line between Huntington, West Virginia and Columbus, Ohio via Catlettsburg, Ashland, and Russell, Kentucky, for failure to operate within sixty (60) days after the permit was granted, as provided in Section 5, Chapter 112 of the acts of the 1926 general assembly.

You are further advised that if you attempt to operate through Kentucky without a permit from this Department that you will be prosecuted and subject to a fine of from $10.00 to $100.00 for each day you operate without a permit.

I am notifying the Public Utilities Commission of Ohio and West Virginia today that your Kentucky permit has been revoked.

Very truly yours,
Signed: "Griffin Kelly"
Commissioner.

(Unprinted Transcript, 231.)

Plaintiff's Exhibit "J-7."

Telegram

Charleston, W. Va., April 3rd, 1928.

To Department of Motor Transportation
Att, Mr. Griffin Kelly.
Frankfort, Ky.

Received letter today read to me by phone from home saying you had revoked certificate because sixty days time had passed and operation had not begun.

Your letter March twelfth extending time to April twentieth account other delays. Advise me by wire to Portsmouth Ohio.

J. P. Grubb.

Plaintiff's Exhibit "J-8."

Telegram

Frankfort, Ky. Apr 3, 1928 (85)

809 Seventh St. Phone 231.

James P. Grubb
Portsmouth, Ohio

If you have letter extending time of operation until April twentieth the order revoking your permit will be rescinded.

Griffin Kelly.

Plaintiff's Exhibit "J-9."

Telegram

Frankfort, Ky. 115A
Apr 17 1928

James P. Grubb
Portsmouth, Ohio

Time extended to begin operating under permit 2204 until April 25.

Griffin Comr
1240P

(Unprinted Transcript, 232.)

Plaintiff's Exhibit "K-1."

State of Kentucky

1928 Registration B 381
Bus Certificate Date 4/21 1928.

Received of Tri-State Transit Co. Portsmouth, Ohio, one hundred and eighty-five and 14/100 dollars $185.14 in payment of state fees for registration of the following described bus for the year 1928:

Make of chassis Studebaker. Make of body ..... Year made 1928, Model 76, Gross weight 8270 lbs. Seating capacity 17. Motive power, gas. Chassis No. 3250591. Motor No. BA-605. Last registered by present owner in the county of ..... state of ..... for year ..... Registration No. ....., or if not previously registered from whom procured: Name Scioto County Motor Co. Address 1622 Gallie St., Portsmouth, O. Date procured 4/20, 1928. Permit 2204.

Signed: "Griffin Kelly"
Commissioner of Motor Transportation.
By "J. E. Cantrill"
Assistant Commissioner.

Note—Seven (7) duplicate receipts all bearing date of April 21, 1928, only differing from the one above given by giving different descriptions of the seven busses, all of which may be found on pages 233, 234, 235, and 236, of the unprinted transcript on file in the clerk's office and identified on said transcript as Plaintiff's Exhibits "K-1", "K-2", "K-3", "K-4", "K-5", "K-6", "K-7", and "K-8."

(Unprinted Transcript 233.)

Plaintiff's Exhibit "M."

Copy

April 13, 1928

In Re: Application of James P. Grubb for a Certificate of Convenience for Operation Over a Regular Route Between Huntington and the Kentucky Line at Kenova.	Before the State Road Commission of West Virginia. Docket No. 1030 Certificate No. 194.

This cause came on to be heard upon application regularly filed, upon notice published as required by this commission, upon protests of the Chesapeake and Ohio Railway Company, the Ohio Valley Electric Railway Company, the Ohio Valley Bus Company, the Interstate Motor Transit Company and the Cannonball Transportation Company, upon testimony produced on behalf of the applicant and the protestants, and upon all other papers formally filed herein, all of which are hereby made a part of the record in this cause, and upon consideration of all of which it is this thirteenth day of April, 1928,

Ordered, that the application of James P. Grubb for a certificate of convenience for operation of motor vehicles for interstate transportation of passengers for compensation over a regular route between Huntington, in Cabell county, and the Kentucky state line at Kenova, in Wayne county, over certain streets and State Route No. 3 (United States Highway No. 60) as designated and described on the map or maps filed with this commission, be, and the same is hereby, granted, the said certificate to be effective until the thirty-first day of December, 1929, unless sooner revoked for cause, subject, however,

to any provisions of law or of the rules and regulations of this commission which are now or which may hereafter become effective.

Ordered, that the said certificate is granted only for interstate transportation and the grantee herein, or its successors or assigns, shall not take on or receive passengers within the state of West Virginia to be discharged within the state of West Virginia.

The granting of the certificate of convenience herein is upon the express condition and understanding that it is not granted upon any showing made to or consideration or finding made by the state road commission of West Virginia that the privilege sought by the applicant is necessary or convenient for the public or that the service so proposed to be rendered by the applicant is not now being adequately performed by any person, firm or corporation, and that this certificate of convenience is, therefore, granted in conformity with the decisions of the United States Supreme Court rendered in the cases of A. J. Buck v. Kuykendall and George W. Bush and Sons Company v. William M. Maloy, et al., and is granted subject to any enlargement or abridgment of the authority of this commission concerning interstate motor vehicle operation arising from any decision of a federal court that may be rendered hereafter or from any law that may be enacted hereafter by the congress of the United States.

(Unprinted Transcript, 237.)

Plaintiff's Exhibit "N."

No. .....

Portsmouth, Ohio April 23 1928.

Pay to the order of State Road Commission W. Va. $387.30 three hundred eighty-seven 30/100 dollars road tax 1928.

The Ohio Valley Bank
Portsmouth, Ohio

Tri State Transit Co.
Jas. P. Grubb

(Unprinted Transcript, 238.)

Plaintiff's Exhibit "P."

December 23d, 1927.

Mr. Arthur Bannon,
Mr. Charles M. Ault,
Portsmouth, Ohio
Gentlemen:

I hereby wish to tender my resignation and connections, so far as my duties and services are concerned, with the Interstate Motor Transit Company and the Cannonball Transportation Company. I will continue with the above mentioned companies, under the supervision of you gentlemen, and will assist in any way you would have me until you can fill my place. I will endeavor to co-operate with you to my fullest extent during the time I am still with you, but will ask that you please relieve me from all duties as soon as possible. My time to remain with said companies not to be longer than January

15th, 1928. I would appreciate it very much if you would make arrangements to relieve me sooner.

Yours very truly,

Signed Jas. P. Grubb.

(Unprinted Transcript, 238.)

Plaintiff's Exhibit "Q."

Agreement

This agreement made and entered into this second day of February, 1928, by and between J. P. Grubb, A. H. Bannon, The Cannonball Transportation Company and The Inter-State Motor Transit Company, witnesseth:

That whereas, A. H. Bannon desires to purchase the stock in said two companies which is now owned by said J. P. Grubb for the sum of twenty thousand dollars ($20,000.00); and

Whereas in addition to said stock the said J. P. Grubb owns and holds certain promissory notes of said companies upon which suit has been filed in the Court of Common Pleas of Scioto county, Ohio, it is therefore agreed by and between all parties hereto that the sale of said stock by said Grubb to said Bannon shall in no way prejudice the rights of the holder of said notes, nor shall the purchase of said stock by said Bannon prejudice any rights of said companies; said notes and said stock being entirely separate transactions and securities and neither shall be deemed to depend on the other.

In witness whereof said parties have hereunto set their hands the day and year aforesaid.

Signed: "J. P. Grubb"

"Arthur H. Bannon"

The Cannonball Transportation Company,

Per "A. H. Bannon," President.

The Inter-State Motor Transit Company,

Per "A. H. Bannon," President.

(Unprinted Transcript, 239.)

Plaintiff's Exhibit "V."

Certificate of Public Convenience and Necessity.

(Sec. 614-88, G. C.)

A certificate of public convenience and necessity is hereby granted The Interstate Motor Transit Company a motor transportation company under the laws of Ohio, whose office or place of business is at Portsmouth, Ohio, to operate over the route and by the schedules heretofore approved by this commission, or which may hereafter be approved by this commission, said route being as follows:

Leave Columbus from Bus Terminal, located at 41 E. Rich St., thence via Rich to Third; thence via Third to Whittier; thence via Whittier to High; thence via High to the corporation line (returning in Columbus via High St. to Rich, thence to 41 E. Rich, Terminal) thence via the Scioto Trail (State Route No. 4) to the county line of Franklin-Pickaway counties; thence via same highway to and through the corporate limits of Circleville to the county line of Pickaway-Ross counties; thence via

same highway to the corporation line of Chillicothe; thence via continuation of Route No. 4 to Bridge St.; thence to Water; thence to Paint St. (thence to Warner hotel); thence via Paint St. to corporation line; thence via the Scioto Trail, State Route No. 4 to the county line of Ross and Pike counties and to and through the corporate limits of Waverly and Piketon to the county line of Pike and Scioto counties; thence via same highway to the corporation line of Portsmouth; thence via Chillicothe St. to Fifth; thence Fifth to Market; thence Market to Second (terminal); thence via Second to Chillicothe St.; thence via Chillicothe St. to Gallia St.; thence via Gallia to Eighth; thence via Eighth to and over viaduct to Gallia; thence via Gallia to Norfolk; thence to Walnut; thence to corporation line of New Boston; east on Rodes Ave. to Pine St.; thence to Gallia; thence east on Gallia to the corporation line of New Boston, which is also the corporation line of Portsmouth; thence east on Gallia to the corporation line of Portsmouth; thence via A. & P. Highway No. 7 to the county line of Scioto-Lawrence counties; thence via same highway to the corporation line of Ironton; thence via Second Street to terminal at Second and Park Sts.; thence via Second to the Ohio river bridge, crossing the bridge into the state of Kentucky—continuing via various highways, etc., through Kentucky and W. Virginia to Charleston, W. Va., end of line and return.

Granted for interstate operation only.

Conditioned, that local subdivisions may make reasonable local police regulations within their respective

boundaries not inconsistent with the provisions of Sections 614-84 to 614-102 of the General Code of Ohio.

Said The Interstate Motor Transit Company shall so operate upon the time and rate schedules now or hereafter filed with and approved by this commission and displayed at the stations, and in each motor bus of said company.

Witness the signature and seal of the commission at Columbus, Ohio, this ninth day of June, 1926.

(Unprinted Transcript, 240.)

FILE COPY

JAN 6

CHARLES ELMORE

IN THE

Supreme Court of the United States

No. [redacted] 491

J. P. GRUBB, A NATURAL PERSON, ETC.,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, ET AL.,
Appellees.

MOTION TO DISMISS OR AFFIRM JUDGMENT AND RECORD SUSTAINING SAME.

GILBERT BETTMAN, Attorney General

T. J. HERBERT, Assistant Attorney General, State House, Columbus, Ohio.

A. R. JOHNSON, Johnson Building, Ironton, Ohio.

MILLER & SEARL, First National Bank Building, Portsmouth, Ohio.

D. H. ARMSTRONG, 16 E. Broad Street, Columbus, Ohio.

BLAIR & BALL, First National Bank Building, Portsmouth, Ohio.

Attorneys for Appellees.

TOOTHAKER & RODENFELS, Law Printers, Columbus, Ohio.

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IN THE

Supreme Court of the United States

No.....

J. P. GRUBB, A NATURAL PERSON, PROPOSING TO OPERATE INTER-STATE, THE TRI-STATE TRANSIT COMPANY,

Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, WILLIAM KLINGER, JAMES W. HUFFMAN AND FRANK MAULLAR, MEMBERS OF AND CONSTITUTING SAID THE PUBLIC UTILITIES COMMISSION OF OHIO, THE INTERSTATE MOTOR TRANSIT, COMPANY, A CORPORATION, THE CANNONBALL TRANSPORTATION COMPANY, A CORPORATION, THE PORTSMOUTH PUBLIC SERVICE COMPANY, A CORPORATION, THE OHIO VALLEY BUS COMPANY, A CORPORATION, ELSA CANTER, SHERIFF SCIOTO COUNTY, OHIO, SHEETS, CHIEF OF POLICE OF PORTSMOUTH, OHIO, AND THE SHERIFF OF FRANKLIN COUNTY, PICKAWAY COUNTY, ROSS COUNTY, PIKE COUNTY AND LAWRENCE COUNTY, ALL OF SAID COUNTIES BEING IN THE STATE OF OHIO, AND THE CHIEFS OF POLICE AND MEMBERS OF THE POLICE DEPARTMENT OF THE CITIES, TOWNS AND VILLAGES OF THE STATE OF OHIO, WHOSE NAMES ARE UNKNOWN TO THE PLAINTIFF AND TOO NUMEROUS TO MENTION,

Appellees.

MOTION OF APPELLEES TO DISMISS OR AFFIRM.

Now come each and all of the appellees and separately and severally move the court to dismiss the order of supersedeas, appeal and this action or affirm the finding, decree and judgment of the court below for the reasons following:

First: The facts contained in the record estop appellant from taking or maintaining the supersedeas, and appeal herein and from further prosecuting this action.

Second: The question on which the supersedeas, this appeal and the decision of the case, depends is so unsubstantial as not to need further argument.

Third: The questions upon which the supersedeas, this appeal and the further prosecution of this action depend, are as follows, to wit:

(a) The right of appellant to obtain and maintain the order of supersedeas, and this appeal and to further prosecute this action from the finding, decree and judgment rendered by the court below, after and upon the fact that appellant had, prior to such finding, litigated the questions made herein, to a final decree and judgment in the Supreme Court, being the highest court of and in the state of Ohio,—to which prosecution, finding, judgment and decree appellant was entitled to have reviewed, upon a writ of error, by said court,—is so well settled and unsubstantial as to not need further argument.

(b) The right of appellant to obtain and maintain the

order of supersedeas and this appeal and to further prosecute this action when, as a matter of fact, appellant had, prior to the finding and entering of the decree and judgment by the court below, litigated the questions made herein to a final decree and judgment in the Supreme Court, being the highest court of, and in, the state of Ohio, which said finding, judgment and decree, appellant was entitled to have reviewed upon a writ of error by this court, estops appellant from bringing, maintaining and prosecuting the supersedeas, this appeal, and this case is so well settled, as to not need further argument.

(c) The facts on which the supersedeas, this appeal and further prosecution of this action herein depend are those set forth in paragraphs one, two, three, four, five, seven, eight, nine and ten of the bill of complaint of appellant, and in addition thereto, the following:

Appellant after filing his said bill of complaint on April 20, 1928, obtained an entry granting a temporary restraining order against the appellees restraining said appellees and each of them from in any manner enforcing or attempting to enforce, causing to be enforced, or aiding another to enforce against appellant or against his agents, servants, drivers or employees that part of the order promulgated by said defendants commission in commission case number 3145 dated April 2, 1929, whereby and wherein appellant was prohibited as follows:

"Ordered that said applicant be, and he hereby is prohibited from incorporating within the regular route,

upon which he will herein be granted a certificate to operate within the state of Ohio, any movement which shall provide for the crossing and recrossing of the Ohio river at Portsmouth, Ohio, appellant caused a certified copy of said entry to be, on the twenty-third and twenty-fifth days of April, 1928, served upon each of the appellees herein, by the marshal of said court, and has thereafter by orders entered in the cause in said court below procured said injunction to remain and be in full force and effect."

Thereafter, to wit: On the thirty-first day of May, 1928, said appellant herein under the provisions of the statutes of the state of Ohio permitting and authorizing him to so do filed his petition in error against the appellee, the Public Utilities Commission of Ohio, in the Supreme Court of the state of Ohio, being case number 21184 in said court containing therein about the same and identical matters set out in the bill of equity herein, the assignments of error in said Supreme Court of Ohio, being:

1. The commission erred in overruling and denying the application for a rehearing.

2. Said part of the order is not sustained by the evidence.

3. Said part of the order is contrary to law.

4. Said part of the order denies plaintiff in error the rights, privileges and immunities guaranteed him as a citizen of the United States under the Fourteenth Amendment to the Constitution of the United States.

5. That said part of the order is in direct violation

of Article 8, Section 1 of the Constitution of the United States, granting power to Congress to regulate commerce among the several states, and is a prohibition of, burden on, and an unlawful interference and restriction to, interstate commerce.

6. That said part of the order is a violation of and contrary to Section 614-101 of the General Code of Ohio.

7. That said part of the order is contrary to the decisions of the Supreme Court of the United States and of the United States District Court, Eastern District of Kentucky, in the case of Magnuson v. Kelly, Commissioner, decided December 2, 1927.

8. That said portion of said order prohibiting interstate commerce or any movement between Portsmouth, Ohio, and South Portsmouth, Kentucky, over the bridge across the Ohio river and reverse, was based on supposed facts and evidence which were not introduced in this proceeding, which formed no part of the record in this case, and which plaintiff in error had no opportunity to meet or controvert.

9. That said part of the order is contrary to the announcement and the written notation thereof made by two sitting commissioners of defendant in error at the end of the hearing March 13, 1928.

10. For other errors appearing on the record.

11. That the part of the order prohibiting interstate movement and commerce nullifies the certificate of public convenience and necessity, known as Kentucky permit No. 2204, by which permit plaintiff in error was granted the right and privilege to move and operate in interstate

commerce from South Portsmouth, Kentucky, over the interstate bridge to Portsmouth, Ohio, and reverse; said Kentucky permit to expire April 25, 1928, unless operation begin thereunder on or before said dates.

"Thereafter, such proceedings were had in said court that said cause came on for hearing before the Supreme Court of the state of Ohio, on October 3, 1928, and the same was fully argued and presented to said court on behalf of said appellant Grubb; that thereafter said Supreme Court, on the fourteenth day of November, 1928, made its finding, order and ruling, sustaining the order of said Public Utilities Commission in the granting of said application, and in the inserting therein of the clause hereinbefore set out, prohibiting said appellant, Grubb, from crossing the Ohio river at Portsmouth, Ohio, as a part of his said route; and, said Supreme Court overruled each, every and all of the assignments of error on behalf of said appellant Grubb, which is hereinbefore set out; and, which said judgment and order of the Supreme Court of the state of Ohio is unappealed from, unreversed, unmodified, and is in full force and effect; and, which said judgment was procured by the appellant Grubb herein.

All of which facts was in this cause in the court below duly set forth in the answer of the appellee, the Public Utilities Commission of Ohio, and the supplement and amendment to answers of The Interstate Motor Transit Company, The Cannonball Transportation Company, The Portsmouth Public Service Company and The Ohio Valley Bus Company, appellees herein, filed May 13, 1929.

The said Public Utilities Commission of Ohio on the hearing of the application of appellant found and adjudged, as a matter of fact, that the proposed divergence by the appellant in the city of Portsmouth, Ohio, to a point immediately outside of the state of Ohio, and the prompt return to said Portsmouth, was clearly for the purpose of creating a subterfuge intrastate transportation, and the evasion of the statutory requirement of the procurement of a certificate to engage in such intrastate motor transportation service within the state of Ohio, and that such subterfuge could be prevented only by denying to the appellant the right to so operate.

In support of the matters herein set forth and said allegations set forth in said answer and supplemental and amendment to said answers, so filed by appellees on May 13, 1929, there was submitted in evidence to the court below herein the transcript and record in said case Number 21184 in said Supreme Court of the state of Ohio, including the opinion of said court affirming the finding of the Public Utilities Commission of Ohio, and the mandate from said Supreme Court to said the Public Utilities Commission of Ohio, setting forth said affirmance, which said facts constitute a full and complete adjudication of all matters set forth in this action and estop appellant from bringing, maintaining or prosecuting, the order of supersedeas and this appeal, and any further prosecution of this action are so well settled as to not need further argument, and the court below so found said facts to constitute such bar, dismissed the bill of complaint of appellant, and dissolved the temporary restraining order herein granted.

Fourth: It is manifest from the record filed herein, that this appeal is taken for delay only.

(That part of the transcript of the record containing the facts necessary for the determination of the foregoing motion is appended hereto.)

The Public Utilities Commission of Ohio,
By Gilbert Bettman and T. J. Herbert, Attorney and Assistant Attorney General of the State of Ohio.
The Ohio Valley Bus Company,
By A. R. Johnson, Its Attorney.
The Ohio Valley Electric Railway Company,
By A. R. Johnson, Its Attorney.
The Portsmouth Public Service Co.,
By Miller & Searl, Its Attorneys.
The Interstate Motor Transit Co.,
By D. H. Armstrong, and
Blair & Ball, Its Attorneys.
The Cannonball Transportation Co.,
By D. H. Armstrong, and
Blair & Ball, Its Attorneys.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

No. 627.

J. P. GRUBB, A NATURAL PERSON, PROPOSING to Operate Interstate The Tri-State Transit Company,

Plaintiff,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, William Klinger, James W. Huffman and Frank Maullar, Members of and Constituting said the Public Utilities Commission of Ohio, The Interstate Motor Transit Company, a Corporation, The Cannonball Transportation Company, a Corporation, The Portsmouth Public Service Company, a Corporation, The Ohio Valley Bus Company, a Corporation, The Ohio Electric Railway Company, a Corporation, Elsa Cantor, Sheriff, Scioto County, Ohio, Sheets, Chief of Police of Portsmouth, Ohio, and the Sheriffs of Franklin County, Pickaway County, Ross County, Pike County and Lawrence County, All of Said Counties Being in the State of Ohio, and the Chiefs of Police and Members of the Police Department of the Cities, Towns and Villages of the State of Ohio, Whose Names Are Unknown to the Plaintiff and Too Numerous to Mention,

Defendants.

BILL OF COMPLAINT.

[Filed April 20, 1928.]

The plaintiff files this his bill of complaint herein and respectfully shows to your Honor:

1. That plaintiff, whose full name is James P. Grubb, is a citizen of the United States, of the state of Ohio

and a resident of the city of Portsmouth, in said state; that plaintiff proposes to, and unless prevented by the defendants, will operate an interstate bus line, as a common carrier, for the transportation of passengers, as hereinafter set forth;

2. That the defendant, the Public Utilities Commission of Ohio, is duly constituted board or commission, intrusted under the laws of the state of Ohio, with the regulation and control of all public utilities, including motor bus lines and other common carriers engaged in intrastate transportation;

3. That the defendants, William Klinger, James W. Huffman and Frank B. Maullar, are, at this time, members of, and constitute said the Public Utilities Commission of Ohio;

4. That each of the defendants, The Interstate Motor Transit Company, The Cannonball Transportation Company, The Portsmouth Public Service Company, The Ohio Valley Bus Company and The Ohio Electric Railway Company, are corporations, organized and existing under the laws of the state of Ohio, having their respective residences and principal places of business in said state;

5. That Sheets is the duly appointed and acting chief of police of the city of Portsmouth, Ohio, and the defendant, Elsa Cantor, is the duly elected sheriff of Scioto county, in which said city of Portsmouth is located, and that the names of other chiefs of police and other sheriffs in the state of Ohio, are to plaintiff unknown and too numerous to mention;

6. This action is brought under the eighth paragraph of Section 24, as amended, of the Judicial Code of the

United States, for the purpose of preventing enforcement of an order of the Public Utilities Commission of Ohio, prohibiting plaintiff as a common carrier, from operating motor busses for hire, in interstate commerce, between Portsmouth, Ohio, and South Portsmouth, Kentucky, and return, crossing and recrossing the bridge over the Ohio river, connecting said municipalities, which said operation is a part of a route from Columbus, Ohio, through the states of Ohio, Kentucky and West Virginia to Huntington, West Virginia, hereinafter more particularly described;

7. That plaintiff has heretofore, to wit, on January 23, 1928, filed an application with the Public Utilities Commission of Ohio for certificates of convenience and necessity, under the laws of Ohio, to operate motor busses, carrying passengers for hire, in interstate commerce only, between the cities of Columbus, Ohio, and Huntington, West Virginia, over a route through Ohio, Kentucky and West Virginia, therein set forth as follows:

> "Leave Columbus, Ohio, from terminal located on East Rich street; thence via Rich street to South Third street; thence to Whittier street, thence to High; thence to corporate line; thence via U. S. Highway No. 23 to the county line of Franklin and Pickaway counties; thence via same highway to and through South Bloomfield and Circleville to the county line of Pickaway and Ross county, thence via same highway to and through Hopetown to the corporate line of Chillicothe; thence via Bridge street, to Water; thence to Paint street and thence to the corporate line; thence via U. S. Highway No. 23 to and through Massieville and Alma to the county line of Ross and Pike counties; thence via same highway to and through Waverly, Piketon, Sargents and

Wakefield to the county line of Pike and Scioto counties; thence via same highway to and through Clifford, Lucasville and George, to the corporation line of Portsmouth, Ohio; thence via Chillicothe street to the Ohio-Kentucky line—crossing river to South Portsmouth, Kentucky, returning to Portsmouth; thence via Chillicothe street to Gallia, thence to Eighth street; thence over viaduct to Gallia, thence via Gallia through New Boston; thence via U. S. Highway No. 52, to and through Wheelersburg, Franklin Furnace and Haverhill to the county line of Scioto and Lawrence counties, thence via same highway (which is also State Route No. 7) to and through Hanging Rock and to the corporation of Ironton; thence via Second street to Bridge, crossing river to Russell, Kentucky, final destination Huntington, West Virginia, and reverse."

8. That on March 13, 1928, a hearing was duly had by the Public Utilities Commission of Ohio, upon plaintiff's application and evidence was there taken, tending to establish that plaintiff is able and willing to maintain and operate eight (8) seventeen (17) passenger busses, at two hour intervals, between the termini of said route, placing his busses approximately sixty miles apart; that plaintiff there showed and now avers that he was and is able and willing to pay all taxes assessed and obey the police regulations imposed upon said operations; that all of the defendant corporations above named were parties in said proceedings, protesting against the granting of said certificate to plaintiff; that at the conclusion of said hearing, said commission publicly announced its decision, as follows:

"We grant him" (meaning the plaintiff therein) "a certificate to engage in interstate service as prayed for, to become effective the first of April."

Thereupon said commission made the following notation upon the folder, in the matter of this plaintiff's said application, being in Case No. 3154, to wit:

"Heard—granted, as prayed for.

(Signed) William Klinger,
F. B. Maullar."

That on or about the fifteenth day of March, 1928, said notation was changed to read, as follows:

"Heard—granted in part—order go out April 1, 1928.

(Signed) William Klinger,
F. B. Maullar,
J. W. Huffman."

9. That the final and formal order in said matter was issued April 2, 1928, effective May 1, 1928, and granted the application of the plaintiff to operate said interstate motor bus line from Columbus, Ohio, through Portsmouth, Ironton, Ohio, and Russell, Kentucky, to Huntington, West Virginia, but denies said application to operate said motor bus line in interstate commerce between Portsmouth, Ohio, and South Portsmouth, Kentucky, and return, and to cross and recross the bridge over the Ohio river between said points, and over the boundary between said states of Ohio and Kentucky, and said order prohibited plaintiff from operating over said portions of said route between Portsmouth, Ohio, and South Portsmouth, Kentucky, said portion of said formal order, so prohibiting, reading as follows:

"Ordered, that said applicant be, and hereby he is, prohibited from incorporating within the regular route upon which he will herein be granted a cer-

tificate to operate within the state of Ohio, any movement which shall provide for the crossing and recrossing of the Ohio river, at Portsmouth, Ohio."

That thereafter, said certificate so issued by the defendant commission, was amended so as to take effect on the eighteenth day of April, 1928;

10. That on the seventeenth day of April, 1928, the plaintiff herein filed his motion with the defendant, the Public Utilities Commission of Ohio, asking that said order, heretofore issued, prohibiting him from incorporating within the regular route upon which he will operate, any movement which shall provide for the crossing and recrossing of the Ohio river at Portsmouth, be amended so as to grant him the right to carry passengers from Portsmouth, Ohio, to South Portsmouth, Kentucky, and return, which said motion was on said day overruled by said commission; and thereupon, on said seventeenth day of April, 1928, said plaintiff herein, filed with the Public Utilities Commission of Ohio, his application for rehearing of so much of its formal order as prohibited plaintiff from incorporating in the regular route upon which he will be granted certificate to operate within the state of Ohio, any movement which shall provide for crossing and recrossing the Ohio river at Portsmouth, Ohio, which said application, said defendant commission, on said seventeenth day of April, 1928, denied:

11. That, relying upon the announcements of said commission, on March 13, 1928, plaintiff ordered eight (8) seventeen (17) passenger busses at a cost of about $40,000.00, engaged his drivers and made all arrange-

ments preliminary to the starting of said motor bus line, and is able and willing, unless prevented, to start said motor bus line by the eighteenth day of April, 1928, when said order of the defendant, the Public Utilities Commission of Ohio, becomes effective;

12. That both Portsmouth, Ohio, and South Portsmouth, Kentucky, are important places in interstate commerce because of their size and because of the bridge between them; that said bridge is the only gateway for north and south travel for a distance of about 40 miles, up and down the Ohio river; that the northern terminus of the C. & O. Railway Company is at South Portsmouth, Kentucky, and its passengers are transferred by busses across the river to Portsmouth, Ohio; that more than 4500 passengers each month leave the trains of said company at South Portsmouth, Kentucky, to continue their travel across said bridge to their various destinations; that said passengers should have the right, if they so wish, to patronize the plaintiff's busses and plaintiff is entitled to transport said passengers who so desire, in interstate traffic, over the route prohibited by the defendant commission; that unless plaintiff can so transport said passengers over said bridge, he cannot transport them at all, to more distant points, since, if he is prohibited from crossing said bridge with passengers and if said prospective passengers should cross said bridge by other means, they would become intrastate passengers and plaintiff is expressly prohibited from carrying passengers whose journey on his busses will be wholly intrastate; that, for the same reason, interstate passen-

gers from Columbus, Ohio, to South Portsmouth, Kentucky, or beyond, or from Ironton, Ohio, to South Portsmouth, Kentucky, and beyond, become intrastate passengers on plaintiff's busses, if he cannot cross the Ohio river from Portsmouth to South Portsmouth, and is forced to discharge said passengers at Portsmouth, Ohio; that plaintiff would thus be prevented from carrying many passengers who, but for the order of said defendant commission, would be patrons and passengers upon plaintiff's said bus line;

That plaintiff will lose in gross traffic income, if he be not permitted to run busses to and from South Portsmouth, Kentucky, more than $5000.00 per month, and if said defendant commission's order refusing him permission so to operate over said Ohio river bridge be not annulled, plaintiff will suffer great and irreparable loss and injury, for which he will have no adequate remedy at law.

13. That plaintiff is the holder of Permit No. 2204, issued by the department of motor transportation of the state of Kentucky, granting a certificate of convenience and necessity to this plaintiff, operating under the name of The Tri-State Transit Company and entitling him to operate a motor bus line from Huntington, West Virginia, via Kenova, West Virginia, Cattletsburg, Kentucky, Russell, Kentucky, Ironton, Ohio, Portsmouth, Ohio; to South Portsmouth, Kentucky, to Portsmouth, Ohio; to Columbus, Ohio;

Said permit is dated January 30, 1928, and will become null and void if said operation is not started on or be-

fore April 25, 1928; that almost the entire distance from Ironton, Ohio, to Huntington, West Virginia, is through the state of Kentucky and is an important and integral part of the entire route from Columbus, Ohio, to Huntington, West Virginia; that the certificate granted by each of said states of Ohio and Kentucky and West Virginia are granted as an entirety; that said grants are inter-dependent; that the route applied for, including that from Portsmouth, Ohio, to South Portsmouth, Kentucky, are required to cover one continuous and feasible route; that each certificate is terminable by the granting authority and may be revoked if applicant fails to operate over the entire route, as granted, or operates over any route in excess of that granted; that the Ohio certificate prohibits plaintiff from operating from Portsmouth, Ohio, to South Portsmouth, Kentucky, and return, while the Kentucky permit requires plaintiff to operate between said points; that the Ohio permit to plaintiff will be revoked if plaintiff operates from Portsmouth, Ohio, to South Portsmouth, Kentucky, and return, and the Kentucky permit will be revoked if he fails to so operate; that if either certificate be revoked, only an intrastate route remains which plaintiff, as an interstate carrier, would not be permitted to operate, all to his great and irreparable loss and damage;

14. That the statutes of Ohio (G. C. 614-100) impose a fine of not to exceed $1000.00 or imprisonment not exceeding one year, or both such fine and imprisonment, upon anyone who violates or fails to comply with statutes regulating public utilities in said state, or who fails

to obey, observe or comply with any order, rule, decision, demand or requirement of the defendant, the Public Utilities Commission of Ohio;

That the defendant commission, the chiefs of police and sheriffs and other defendants, will arrest or cause plaintiff to be arrested and punished if he attempts to engage in interstate transportation between Portsmouth, Ohio, and South Portsmouth, Kentucky; that because of the constraint and intimidation of said unusual penalties and hostile attitude of plaintiff's competitors, the defendant corporations, plaintiff will be compelled to operate, if at all, without crossing the bridge to South Portsmouth, Kentucky, and return; that if he does not operate over said bridge, he will lose the Kentucky permit heretofore granted him, as aforesaid; that if he is not permitted to operate in Kentucky, his bus line will cease to be an interstate operation and plaintiff will lose all his present rights to operate either in Ohio or Kentucky; that his entire project, therefore, is contingent upon his right to operate between Portsmouth, Ohio, and South Portsmouth, Kentucky;

15. That plaintiff is and will be in competition in the operation of his said bus line, with all of the defendant corporations and especially with one of the defendants, The Interstate Motor Transit Company, which said company is now operating between Columbus, Ohio, and Huntington, West Virginia; that on the twenty-first day of September, 1927, the defendant, the Public Utilities Commission of Ohio, granted to said The Interstate Motor Transit Company the right to operate its said bus

line from Portsmouth, Ohio, to South Portsmouth, Kentucky, and return, crossing and recrossing the Ohio river, over the bridge between said points, as a part of its route between Columbus, Ohio, and Huntington, West Virginia; that said certificate is still in effect and said company is still so operating between said points; that said commission by its order on plaintiff's application, above quoted, has now prohibited this plaintiff from operating over the identical route between Portsmouth, Ohio, and South Portsmouth, Kentucky, which by its order of September 21, 1927, it granted to plaintiff's competitor; all in violation of plaintiff's right to the equal protection of the laws and contrary to the Fourteenth Amendment to the Constitution of these United States of America;

16. That the order so prohibiting plaintiff from operating an interstate bus line for passengers, between Portsmouth, Ohio, and South Portsmouth, Kentucky, and return, crossing and recrossing over the Ohio river bridge, is an unlawful exercise of the police powers of said the Public Utilities Commission of Ohio and of the state of Ohio, and is a prohibition of interstate commerce and an unwarranted obstruction to commerce between the states and contrary to the "commerce clause" of the Constitution of these United States of America, being Section 8 of Article 1 of said Constitution; said order of prohibition is also contrary to the statutes of Ohio Section 614-84 to Section 614-102 inclusive, of the General Code of Ohio, which establish and govern the Public Utilities Commission of Ohio, in that said statutes provide in Section 614-101, G. C., that no provision of

the Ohio Code shall be construed to apply to commerce with foreign nations or countries, or among the several states of this Union, except so far as the same may be permitted under the provisions of the Constitution of the United States and of the acts of congress; that there is no warrant or authority granted the Public Utilities Commission of Ohio either in said Constitution of the United States or in the acts of congress, which would empower said defendant commission to prohibit the interstate movement of plaintiff's busses from Portsmouth, Ohio, to South Portsmouth, Kentucky, and return;

17. That the defendant corporations have threatened that they will bankrupt plaintiff by persistent harrassing and continued litigation in the various courts; that they will cause plaintiff and his drivers to be arrested if they attempt to operate between Portsmouth, Ohio, and South Portsmouth, Kentucky; that said defendant corporations have already joined in an action, No. 21515 in the Common Pleas Court of Scioto county, Ohio, seeking to enjoin the defendant, the Public Utilities Commission of Ohio, from issuing any certificate of convenience and necessity to plaintiff and to enjoin plaintiff from accepting any such certificate from said defendant commission, entitling plaintiff to operate a motor bus line as hereinbefore described, from Columbus, Ohio, to Huntington, West Virginia, and to enjoin plaintiff from so operating; that said court is without jurisdiction in the subject matter of said action and that fact is well known to the defendant corporations and to their counsel; said action is not brought in good faith, but for the purpose of harrassing

and annoying the plaintiff herein; that the statutes of Ohio, Section 549, G. C., expressly give to the Supreme Court of said state exclusive jurisdiction to review, suspend, or delay any order made by the Public Utilities Commission, or to enjoin, restrain or interfere with said commission or any of its members, and expressly deny such jurisdiction to any other court in said state; that notwithstanding this express provision of the statutes of Ohio, and regardless of the lack of jurisdiction of said Common Pleas Court, said defendant corporations are endeavoring to harrass and annoy plaintiff and are unlawfully and fraudulently attempting to destroy him as a possible competitor; that said defendant corporations have subpoenaed plaintiff as witness for cross examination before a notary public, in order, ostensibly, to take his deposition in said proceeding in the Common Pleas Court of Scioto county of Ohio and have commanded him by said subpoena, to bring with him all his books, papers, contracts, promissory notes and correspondence, with the evident purpose of revealing all the plaintiff's business and private affairs, to his competitors. That some of the defendant corporations, whose names are to the plaintiff unknown, have sought unlawfully and maliciously to prevent plaintiff from obtaining delivery of the motor busses for which he has contracted and have offered the manufacturer of said busses that they will give said manufacturer of said busses an order for 200 busses if said manufacturer will cancel plaintiff's order for eight busses.

18. That the order of said the Public Utilities Com-

mission of Ohio so prohibiting plaintiff from operating between Portsmouth, Ohio, and South Portsmouth, Kentucky, and the threatened arrest of plaintiff and his drivers are unwarranted, unlawful, oppressive, discriminatory, contrary to the laws of Ohio and the Constitution of these United States; that the multiplicity of actions and threatened actions of the defendant corporations, in instituting and maintaining needless and harrassing litigations, are unlawful, constitute unfair competition, and if not restrained will actually bankrupt plaintiff and deprive him of his property without due process of law; that plaintiff has no adequate remedy at law and unless the defendants and each of them, be restrained pending this action and permanently enjoined as herein prayed, plaintiff will suffer great and irreparable loss and injury and be greatly damaged in his business and property.

Wherefore, plaintiff prays that a writ of subpoena issue herein, directed to the above defendants, the Public Utilities Commission of Ohio, William Klinger, F. B. Maullar and J. W. Huffman, members and constituting the Public Utilities Commission of Ohio, The Interstate Motor Transit Company, Portsmouth, Ohio, The Cannonball Transportation Company of Portsmouth, Ohio, The Portsmouth Public Service Company of Portsmouth, Ohio, The Ohio Valley Bus Company of Ironton, Ohio, The Ohio Electric Railway Company of Ironton, Ohio, Elsa Cantor, sheriff of Scioto county, Portsmouth, Ohio, and Sheets, chief of police of Portsmouth, Ohio, requiring them to answer the averments of said bill of complaint, but not under oath, the same being expressly

waived; that the said herein named defendants and each of them, their agents, servants, employees, subordinates, deputies and inspectors of each and every of them, be enjoined and restrained from in any manner interfering, or attempting to interfere, causing to interfere or aiding others to interfere with or against the plaintiff, or his agents, servants or employees, in his operation as a motor transportation company common carrier, operating exclusively in interstate commerce, carrying passengers for hire on and over the route described in his application filed January 23, 1928, with the defendant commission, and from stopping, attempting to stop, causing to be stopped, or aiding others to stop his motor busses or his drivers, agents, servants, employees and passengers riding or attempting to ride on said busses in interstate commerce over said described route, and from instituting and prosecuting, or causing to be instituted and prosecuted or aiding others to institute and prosecute any criminal prosecutions against them, and from instituting and/or prosecuting any proceedings whatsoever that interfere or tend to interfere with, or restrict, or tend to restrict, or obstruct or tend to obstruct, or prohibit, or burden or tend to burden interstate commerce, over said route as described, and that on final hearing that said prayed for injunction be made perpetual.

Plaintiff further prays that he be granted a temporary restraining order, pending further hearing of this cause, whereby said defendants, their agents, servants, employees, deputies, inspectors, and each of them be enjoined and restrained as hereinabove prayed, in order to

prevent irreparable loss and damage to plaintiff in his operation in interstate commerce exclusively; that pursuant to the provisions of Section 266 of the Judicial Code (act of June 18, 1910, 36 Stat., 557, as amended, act of February 13, 1925), upon notice being given as required by said statute, plaintiff be granted an interlocutory injunction, pending final hearing and decision of this cause, whereby said defendants in this prayer named, their agents, servants, employees, deputies, subordinates and inspectors and each and every one of them, be enjoined and restrained as hereinabove prayed, and that upon final hearing, said injunction be made perpetual; for costs herein expended and for such other and further relief as the court may deem just and equitable in the premises.

John F. Carlisle,
Frank M. Raymund,
Edwin D. Ricketts,
By F. M. R.,
Solicitors and Counsel for Plaintiff.

[Duly verified.]

AMENDMENT TO BILL OF COMPLAINT.

[Filed May 10, 1928.]

For his amendment to the bill of complaint herein, plaintiff amends paragraph 6 so as to read as follows:

6. This action is brought under the first paragraph of Section 24, as amended, of the Judicial Code of the United States, for the purpose of preventing the enforcement of an order of the Public Utilities Commission of Ohio, prohibiting plaintiff as a common carrier, from

operating motor busses for hire, in interstate commerce, between Portsmouth, Ohio, and a place in the state of Kentucky across the bridge from said Portsmouth, Ohio, and known as South Portsmouth, Kentucky, and return, crossing and recrossing the bridge over the Ohio river, connecting the said states of Ohio and Kentucky at said places, which said operation is a part of a route from Columbus, Ohio, through the states of Ohio, Kentucky and West Virginia to Huntington, West Virginia, in the bill of complaint more particularly described; that the defendant, the Public Utilities Commission of Ohio, is resident of Columbus, Franklin county, Ohio; that this action and suit is of a civil nature, and that the matter and amount in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, involves a federal question, and arises under Article 1, Section 8 of the Constitution of the United States, which provides that congress shall have power to regulate commerce with foreign nations, and among the several states and with the Indian tribes, and also arises under the Fourteenth Amendment to said Constitution of the United States, providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wherefore, plaintiff prays as in said bill of complaint herein heretofore filed.

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Attorneys and Solicitors for Plaintiff.

[Duly verified.]

ENTRY GRANTING TEMPORARY RESTRAINING ORDER.

[Filed May 21, 1928.]

This day this cause came on to be heard upon the application of the plaintiff herein, for a temporary restraining order and was submitted to the court; upon consideration whereof, this court does hereby grant the same, returnable April 30, 1928, and upon giving a surety bond in the sum of $2500.00 satisfactory to the clerk, it is ordered that a temporary restraining order issue against the defendants, the Public Utilities Commission of Ohio, William Klinger, James W. Huffman and Frank Maullar, members of and constituting said the Public Utilities Commission of Ohio, The Interstate Motor Transit Company, The Cannonball Transportation Company, The Portsmouth Public Service Company, The Ohio Valley Bus Company, The Ohio Electric Railway Company, corporations, Elsa Cantor, sheriff of Scioto county, Ohio, and Sheets, chief of Police of Portsmouth, Ohio, and the sheriffs of Franklin, Pickaway, Ross, Pike and Lawrence counties, all of said counties being in the state of Ohio, and the chiefs of police and members of the police department of the cities, towns and villages of the state of Ohio, whose names are unknown to the plaintiff, and too numerous to mention, restraining said defendants and each of them, their agents, servants, employees, subordinates, deputies, inspectors and each and every of them, from in any manner enforcing or attempting to enforce, causing to be enforced, or aiding others to enforce

against plaintiff or against his agents, servants, drivers and employees, that part of the order promulgated by said defendant commission in Commission's Case No. 3154, dated April 2, 1928, whereby and wherein said plaintiff was prohibited, as follows:

> "Ordered that said applicant be, and he hereby is, prohibited from incorporating within the regular route, upon which he will herein be granted a certificate to operate within the state of Ohio, any movement which shall provide for the crossing and recrossing of the Ohio river at Portsmouth, Ohio;"

and from stopping, attempting to stop, causing to be stopped, or aiding others to stop plaintiff's motor busses while operating and/or transporting persons and passengers in interstate commerce, from arresting, or causing to be arrested, or aiding others to arrest plaintiff or his drivers, agents, servants or employees; from instituting, causing to be instituted, or aiding others to institute any criminal prosecution against him, or them, and from prosecuting or aiding others to prosecute any criminal proceedings now or hereafter pending against said plaintiff; and from prosecuting and/or instituting any injunctive proceedings, or in any manner interfering with plaintiff in his operation as a motor common carrier, in exclusively interstate commerce.

It is further ordered that a copy of this temporary restraining order be served by the marshal of this court, upon said defendants.

Benson W. Hough, Judge.

U. S. Marshal's Return.

Received this writ at Columbus, Ohio, on April 21, 1928, and served same as follows:

On April 23, 1928, served the within named The Cannonball Transportation Company, by delivering a true copy of this writ, with the endorsements thereon, to Charles Arthur, manager of said company, personally at Portsmouth, Ohio;

On April 23, 1928, served the within named The Interstate Motor Transit Company, by delivering a true copy of this writ, with the endorsements thereon, to Charles Arthur, manager of said company, personally at Portsmouth, Ohio.

On April 23, 1928, served the within named The Portsmouth Public Service Company, by delivering a true copy of this writ, with the endorsements thereon, to C. T. Long, manager of said company, personally at Portsmouth, Ohio.

On April 23, 1928, served the within named The Ohio Electric Railway Company, by delivering a true copy of this writ, with the endorsements thereon, to Cliff Thurma, manager of said company, personally at Ironton, Ohio;

No chief officer or higher representative of any of the foregoing named defendants found in this district upon whom to effect service.

And on April 23, 1928, served same on the within named Elza Cantor, sheriff of Scioto county, and Harry S. Sheets, chief of police of Portsmouth, Ohio, by delivering to each a true copy of this writ, with the endorsements thereon, personally at Portsmouth, Ohio.

And on April 25, 1928, I served the within named the Public Utilities Commission of Ohio, by delivering a true copy of this writ, with the endorsements thereon, to William Klinger, chairman of said commission, personally at Columbus, Ohio;

And on the same day I served the within named William Klinger, Frank B. Maullar and James W. Huffman, members of and constituting said the Public Utilities Commission of Ohio, by delivering to each personally a true copy of this writ, with the endorsements thereon, at Columbus, Ohio.

The Ohio Valley Bus Company not served; no official of said company found in this district.

No further services made under this writ.

Stanley Borthwick,
U. S. Marshal, S. D. O.
By Jos. L. Lowery,
Deputy.
By J. Nomish,
Deputy.

BOND COVERING TEMPORARY RESTRAINING ORDER.

Know All Men By These Presents: That J. P. Grubb of Portsmouth, Ohio, is held and firmly bound unto the Public Utilities Commission of Ohio, Wm. Klinger, James W. Huffman and Frank Maullar, members of and constituting said the Public Utilities Commission of Ohio; The Interstate Motor Transit Company, a corporation; The Cannon Ball Transportation Company, a corporation; The Portsmouth Public Service Company, a cor-

poration; The Ohio Valley Bus Company, a corporation; The Ohio Electric Railway Company, a corporation; and Elsa Cantor, sheriff of Scioto county, Ohio, in the sum of twenty-five hundred ($2500.00) dollars, to the payment of which we bind ourselves, our heirs, executors and administrators, successors and assigns firmly by these presents.

Sealed with our seal, and dated this twenty-first day of April, A. D. 1928.

The condition of the above obligation is such, that whereas, J. P. Grubb, citizen of the state of Ohio, having filed in the District Court of the United States for the Southern District of Ohio, a bill against the said the Public Utilities Commission of Ohio, Wm. Klinger, James W. Huffman and Frank Maullar, members of and constituting said the Public Utilities Commission of Ohio; The Interstate Motor Transit Company, a corporation; The Cannon Ball Transportation Company, a corporation; The Portsmouth Public Service Company, a corporation; The Ohio Valley Bus Company, a corporation; The Ohio Electric Railway Company, a corporation; and Elsa Cantor, sheriff of Scioto county, Ohio, and having obtained an allowance of a temporary restraining order as prayed for in said bill.

Now, if the said J. P. Grubb shall abide the decision of said court and pay all moneys and costs which shall be adjudged against him in case the said injunction shall be dissolved, then these presents shall be void; otherwise to remain in full force.

J. P. Grubb.
Royal Indemnity Company,
By L. J. O'Donnell,
Attorney in Fact.

[Seal.]

JOURNAL ENTRY GRANTING LEAVE TO FILE AMENDMENT TO BILL OF COMPLAINT.

On application of the plaintiff and for good cause shown, the plaintiff is hereby granted leave to file an amendment to his bill of complaint instanter.

In accordance with Equity Rule No. 28, plaintiff is ordered to furnish said solicitor of record of each opposing party, a copy of said amendment to said bill of complaint.

Approved:

Benson W. Hough, Judge.

Dated May 10, 1928.

MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER.

[Filed May 3, 1928.]

Now comes the defendants, The Interstate Motor Transit Company, a corporation, The Cannon Ball Transportation Company, a corporation, The Portsmouth Public Service Company, a corporation, and The Ohio Valley Electric Railway Company, a corporation, and separately and severally move this honorable court to dissolve the temporary restraining order heretofore granted in this case for the following reasons, to wit:

First. That the facts set forth in said petition and affidavit on which said order was made is not sufficient in law to warrant the same.

Second. That the defendant, The Interstate Motor Transit Company, has filed herein a good and sufficient

answer, under oath, and the facts set forth in said answer are true.

We, the undersigned several defendants first hereinabove named, for the purpose of this motion, separately and severally adopt the allegations of said answer as being the facts in the case.

Dan H. Armstrong,
Blair & Ball,
Attorneys for Interstate Motor Transit Co. and The Cannon Ball Transportation Co.

Miller Searl,
Attorney for The Portsmouth Public Service Company.

A. R. Johnson,
Attorney for Ohio Valley Electric Ry. Co.

ANSWER OF THE DEFENDANT, THE INTERSTATE MOTOR TRANSIT COMPANY.

[Filed May 3, 1928.]

Now comes the defendant, The Interstate Motor Transit Company, and for answer to the bill of complaint of plaintiff filed herein says:

1. That it denies that plaintiff will, unless prevented by these defendants, or either or any of them, operate an interstate or other bus line as a common carrier for the transportation of passengers as set out in paragraph 1, of said bill of complaint.

2. That it admits the facts set out in paragraph two of said bill of complaint.

3. That it admits the facts set out in paragraph three of said bill of complaint.

4. That it admits the facts set out in paragraph four of said bill of complaint.

5. That it admits the facts set out in paragraph five of said bill of complaint.

6. That it denies that this action is brought or comes under or within the meaning of the eighth paragraph of Section Twenty-four of the Judicial Code of the United States, as amended, or otherwise; that this action is to prevent the enforcement of an order relating to or prohibiting plaintiff from carrying on an interstate commerce business as a motor bus operator between Portsmouth, Ohio, and South Portsmouth, Kentucky, as is alleged in said paragraph six or otherwise; that South Portsmouth, Kentucky, is within a municipal corporation, or that there is any such municipality in the state of Kentucky as South Portsmouth; that the operation of a bus from Portsmouth, Ohio, to South Portsmouth, Kentucky, connects up the city of Portsmouth, Ohio, with any municipal corporation on the Kentucky side.

7. That it denies that on January 23, 1928, or other date, the plaintiff filed an application with the Public Utilities Commission of Ohio, for a certificate of convenience and necessity under the laws of the state of Ohio, carrying passengers for hire in interstate commerce only or otherwise, between the cities of Columbus, Ohio, and Huntington, West Virginia, over the route set out in said paragraph seven, or any other route, but, on the contrary, that if plaintiff was connected with or proposed to operate a bus line as is set out in paragraph seven, or otherwise, it was to operate "The Tri-State Transit Company," and that in name and in fact there never was and is not now any such company.

8. Denies that the evidence proffered to the Public Utilities Commission of Ohio on March 13, 1928, or other date, upon plaintiff's application, tended to establish that plaintiff was or is able and willing to maintain or operate eight seventeen-passenger busses, or any number whatsoever, of passenger busses, at two-hour intervals, or at other intervals, between the termini over said route set out in paragraph seven of said bill of complaint, placing his busses sixty miles apart or any other number of miles apart; that plaintiff showed, or is now able and willing to pay, all taxes assessed, and that he is able to and would obey the police regulations imposed upon such operation of such busses; that any certificate was proposed to be issued by the Public Utilities Commission of Ohio to plaintiff, but on the contrary, if any certificate so issued, it was to The Tri-State Transit Company.

9. It denies that said commission granted an application to plaintiff to operate said interstate bus line from Columbus, Ohio, through Portsmouth and other cities to Huntington, West Virginia, on April 2, 1928, or other date, effective May 1, 1928, or other date, for that, said plaintiff had no application pending before said Public Utilities Commission asking for such permit.

10. It denies that plaintiff filed his motion with defendant, the Public Utilities Commission of Ohio, asking the matters and things set out in paragraph ten of said bill of complaint, but if any such was made, it was made on behalf of The Tri-State Transit Company, and this defendant is informed that said Public Utilities Commission did deny a rehearing of the same.

11. For want of knowledge it denies that on March 13, 1928, plaintiff ordered eight seventeen-passenger busses at a cost of $40,000.00, or any other amount, upon reliance of the announcement of said commission, but on the contraverse, that whatsoever arrangement said plaintiff did have relating to the procuring of busses was made prior to the hearing before the Public Utilities Commission of Ohio on March 13, 1928; that plaintiff engaged the drivers and made all arrangements preliminary to the starting of said bus line or any of said busses on the faith and reliance of the announcement of said Public Utilities Commission, or upon any action of said Public Utilities Commission made on March 13, 1928, or thereafter; that plaintiff is able and willing to start said motor bus line by the eighteenth day of April, 1928, or other date, as is set out in paragraph eleven of said bill of complaint, or otherwise.

12. In pleading to paragraph twelve of said bill of complaint, this defendant says that it is not true that there would be forty-five hundred passengers each month between South Portsmouth, Kentucky, and Portsmouth, Ohio, that would be subject to travel on plaintiff's bus line or any other bus line, but avers, as a fact, that the terminus of plaintiff's proposed bus line or service is at the Kentucky end of the bridge across the Ohio river, which is not near and not in touch with the Chesapeake and Ohio passenger station in Kentucky, and that, as a fact, persons going from Portsmouth, Ohio, to South Portsmouth, Kentucky, to take the Chesapeake and Ohio train and passengers alighting at South Portsmouth,

Kentucky, ultimate destination being Portsmouth, Ohio, are conveyed, free of charge, by transportation arranged for by The Chesapeake and Ohio Railway Company, and that as a public carrier, independent of plaintiff or plaintiff's busses the said Chesapeake and Ohio Railway Company maintain a ticket office in the city of Portsmouth, Ohio, for the convenience of the traveling public upon its line to and from South Portsmouth, Kentucky, and to and from which it delivers passengers and their baggage to its trains at said South Portsmouth, Kentucky.

This defendant further avers that the proposed schedule submitted through plaintiff for The Tri-State Transit Company, does not coincide with the arrival or departure of passenger trains of The Chesapeake and Ohio Railway Company at its passenger station at said South Portsmouth, Kentucky, or otherwise.

It denies that plaintiff will lose gross traffic income or any income if not permitted to run busses to and from South Portsmouth, Kentucky, in the sum of five thousand dollars per month or any amount whatsoever.

It denies that plaintiff will suffer any great and irreparable loss and injury by reason of the matters complained of in said paragraph twelve.

13. For want of knowledge, this defendant denies the allegations and statements in paragraph thirteen of said bill of complaint; and, for want of knowledge, denies that if such permit exists of date of January 30, 1928, it will become null and void if operation is not started prior to April 25, 1928.

It denies that almost the entire distance from Ironton,

Ohio, to Huntington, West Virginia, is in the state of Kentucky, but, on the contrary, avers that one crosses the bridge at Russell, Kentucky, and go a distance of some nine miles in the state of Kentucky, and thence into the state of West Virginia, a distance of twelve miles, into the city of Huntington; and that plaintiff's complaint about the failure to allow or permit the crossing from Portsmouth, Ohio, to South Portsmouth, Kentucky, is thirty miles or more distant down the river from where the plaintiff would cross the Ohio river at Ironton, Ohio, to Russell, Kentucky, to go to the city of Huntington, West Virginia.

It denies that the grants between the states of West Virginia, Ohio, and Kentucky, were granted as an entirety, or are interdependent.

It denies that the route crossing the Ohio river from Portsmouth, Ohio, to South Portsmouth, Kentucky, is any part of the direct route or line extending from Columbus, Ohio, to Huntington, West Virginia, but the same is a departure and an unnecessary lengthening and increasing the expense of travel in time to the passenger.

It denies that the Kentucky permit as claimed by plaintiff will be invalidated or revoked by the failure or negligence to permit plaintiff to cross the Ohio river from Portsmouth, Ohio, to South Portsmouth, Kentucky; that the revocation of any one of the certificates would cause plaintiff to carry on an intrastate route or business, but, on the contrary, avers that the permit in Ohio and West Virginia makes a complete line from Huntington, West Virginia, to Columbus, Ohio; that the permit from the

states of Kentucky and West Virginia will grant an interstate line from Russell, Kentucky, to Huntington, West Virginia; that plaintiff would receive any great and irreparable loss or any damage at all by reason of the refusal of a certificate to go from Portsmouth, Ohio, to South Portsmouth, Kentucky.

14. Answering paragraph fourteen of said bill of complaint, it denies that by reason of any act, and particularly by reason of any act of this answering defendant, that if plaintiff is not permitted to operate over the bridge over the Ohio river between Portsmouth, Ohio, and South Portsmouth, Kentucky, he will lose the Kentucky permit heretofore granted him, as set out therein, or otherwise; that if plaintiff is not permitted to operate in Kentucky his bus line will cease to be an interstate operation, and that he will lose his right to operate either in Ohio, Kentucky or West Virginia, or either of said states; that his entire project is contingent on his right to operate between Portsmouth, Ohio, and South Portsmouth, Kentucky.

15. It denies, as is set out in paragraph fifteen, that the claims or statements made therein relative to this defendant or any other defendant, are in violation of plaintiff's rights to the equal protection of the laws of our country, and that the same, or any part thereof, are contrary to the Fourteenth Amendment to the Constitution of the United States of America.

16. Answering paragraph sixteen of said bill of complaint, it denies that the refusal to grant to plaintiff a right to operate between Portsmouth, Ohio, and South

Portsmouth, Kentucky, is an unlawful exercise of the police powers of the state of Ohio, or a wrongful or unlawful act on the part of the Public Utilities Commission of Ohio; that it is a prohibition of interstate commerce; that it is an unwarranted obstruction or any obstruction at all to commerce between the states; that it is contrary to the commerce clause of the Constitution of the United States of America, be it Section Eight of Article One, or any other provision of the Constitution; that the same is contrary to the statutes of the state of Ohio as set out in said paragraph sixteen or otherwise; that the Public Utilities Commission of Ohio was not warranted and authorized by the laws of the state of Ohio, as well as the Constitution of the United States and acts of congress to do or to make the order complained of.

17. Answering paragraph seventeen, denies that the defendant has threatened that they will bankrupt plaintiff; that it will persistently or otherwise harrass plaintiff by continuing litigation in various courts or otherwise; that it will cause plaintiff or plaintiff's drivers to be arrested in an attempt to operate busses between Portsmouth, Ohio, and South Portsmouth, Kentucky.

Defendant says that it is true that a suit was filed in the Common Pleas Court of Scioto county, Ohio, seeking to enjoin defendant, the Public Utilities Commission of Ohio, in issuing of a certificate of convenience and necessity to plaintiff; likewise to enjoin plaintiff from accepting such a certificate entitling plaintiff to operate a motor bus line as described in said petition, but avers that said suit was filed to determine the property rights and

interests, and franchise rights, of the respective parties, in good faith, to protect not only such property rights and interests, but also the traveling public, as there was no necessity for the issuing of a certificate of convenience and necessity to plaintiff for the accommodation of the traveling public, and for other reasons, as is hereinafter set out.

Further answering paragraph seventeen, denies that said Court of Common Pleas is without jurisdiction of the subject matter to said action; that same is known to this defendant, or to defendant's counsel; that said suit is not brought in good faith; that said suit was for the purpose of harrassing and annoying plaintiff; that the Supreme Court has exclusive jurisdiction over the subject matter of suit now pending in said Scioto county Common Pleas Court; that said Scioto county Common Pleas Court lacks jurisdiction over the subject matter pled therein; that defendant is endeavoring to harrass and annoy plaintiff, or unlawfully and fraudulently attempting to destroy plaintiff as a competitor or otherwise.

This defendant says that it is true that they attempted to subpoena plaintiff as a witness as upon cross examination, and that plaintiff secreted himself in such a way as he would not be served with such subpoena, and to avoid service for the purpose of ascertaining and finding out the actual facts which plaintiff must disclose under oath to show that he is not only incompetent to operate such a line, that he has not the means to operate the same, but that that he is proffering to do so to try and force this

answering defendant to pay plaintiff a large amount of money for the franchise or certificate of convenience and necessity which the Public Utilities Commission is claimed to have granted plaintiff.

Denies that defendants, or that this defendant in conjunction with any other company or person, have sought unlawfully and maliciously or otherwise, to prevent plaintiff from obtaining the delivery of motor busses which plaintiff contracted for or otherwise; that this defendant offered, by itself or in conjunction with any other person or corporation, the manufacturer of busses or had any dealings with the manufacturer of busses that it or any other person or company would give an order for two hundred busses or any other number, if the manufacturer of busses for plaintiff would cancel plaintiff's order for said eight busses or otherwise.

18. Answering paragraph eighteen, it denies that the order of said Public Utilities Commission of Ohio, prohibiting plaintiff from operating between Portsmouth, Ohio, and South Portsmouth, Kentucky, is unwarranted, unlawful, oppressive, discriminatory, contrary to the laws of Ohio and the Constitution of the United States, or any other laws; that this defendant, or any other corporation or person, threatened to have plaintiff or his drivers, arrested, unwarrantedly, unlawfully, oppressively or otherwise; that there will be a multiplicity of suits or actions by this answering defendant or any other corporation or persons, as is set out in said paragraph eighteen; that there are any needless and harrassing litigations or any unlawful litigations; that any act of this

answering defendant or any other corporation or person in this matter constitutes unfair competition; that this answering defendant is doing or consenting to be done or taking any action whatsoever that will bankrupt plaintiff or deprive plaintiff of his property, without due process of law or otherwise; that plaintiff has no adequate remedy at law; that if defendants and each or all of them are not restrained pending this action, and permanently enjoined as asked for by plaintiff, that plaintiff will suffer great or irreparable loss and injury or any loss and injury, or that plaintiff will be greatly damaged or injured in his business or property or otherwise by any unlawful, unauthorized or illegal act of this defendant, or any other corporation or person.

Further answering said bill in equity this answering defendant says that it now is and ever since the twelfth day of November, 1926, has been operating an interstate motor transportation of passengers from the city of Columbus, Ohio, by way of Huntington, West Virginia, to the city of Charleston, West Virginia, over the identical route from Columbus, Ohio, to Portsmouth, Ohio, to Ironton, Ohio, Ashland, Kentucky, to Huntington, West Virginia, over which plaintiff herein is certificated to operate, under name of "The Tri-State Transit Company."

It says further that from the beginning of its operation until the fifteenth day of January, 1928, said James P. Grubb, was financially interested in, was general manager of, and had supervision and control over its operation. That about the first day of March, 1923, said plain-

tiff began the operation of the defendant, The Cannon Ball Transportation Company, and operated same over a part of the line over which he is now proposing to operate his interstate motor transportation, when in December, 1925, he sold and transferred all of his interest in said The Cannon Ball Transportation Company, receiving therefor some sixty thousand dollars for his certificate of convenience and necessity, or right to operate.

On or about the nineteenth day of February, 1927, said James P. Grubb—plaintiff herein—and those associated with him, in the ownership and operation of this answering defendant, acquired all of the stock and thereby became owners of said The Cannon Ball Transportation Company. Said plaintiff in the operation of this defendant's corporation and of said The Cannon Ball Transportation Company, after the acquirement thereof, was president, director and general manager of each of said corporations, and as such had the supervision and control of the operation and charge of the finances and books and accounts of each of said corporations.

In the late summer or early fall of 1927, the said persons so financially interested with said James P. Grubb demanded that an accounting be had and the books of each of said corporations audited to which demand said James P. Grubb then objected. His associates procured a competent bookkeeper and accountant who took charge of and audited the books of this answering defendant together with the books of said The Cannon Ball Transportation Company. Upon the audit of said books and accounts it was disclosed that there was a shortage of a

large sum in the cash belonging to each of said corporations, and that said James P. Grubb had neglected and failed to enter up and account for large sums of money received by him while he was such president and general manager and belonging to each of said corporations, and that the books of said corporations contained no entry or charge thereof. Thereupon, said James P. Grubb became incensed at his associates, conceived the idea, and proceeded to carry out and do each and all of the things and matters set forth in his petition and hereinafter set forth, for the purpose and with the intent of unlawfully and fraudulently competing with this answering defendant in its business and causing it and the owners of its stock to either lose large sums of money and become bankrupt, or purchase their peace with said James P. Grubb by buying the equipment proposed to be operated by him at an exorbitant value and paying him a large sum for his certificate and franchise set forth in his bill of complaint. In order to carry out the matters and things last hereinbefore mentioned said James P. Grubb tendered his resignation as such president and general manager of said corporations and ceased to operate the same on January 15, 1928.

This answering defendant says that the said bookkeeper and accountants are still discovering moneys and assets coming into the hands of said James P. Grubb, as general manager of this answering defendant and The Cannon Ball Transportation Company, which were not entered of record on the books and records of said corporations, and for which he has not accounted, and that

he is now indebted on account of said shortages of cash, overdrafts and moneys coming into his hands, and that he has failed and neglected to give to his associates and said accountants reasonable effort to ascertain and find out the exact status of the accounts of said corporations while under his management and control.

Immediately thereafter, to wit, on the twenty-third day of January, 1928, said plaintiff prepared and filed with the Public Utilities Commission of Ohio, under the title of "In the Matter of J. P. Grubb, Proposing to Operate The Tri-State Transit Company, a Motor Transportation Company," the application for interstate certificate of public convenience and necessity over the route set out in plaintiff's petition. Thereafter, on the twenty-sixth day of January, 1928, he prepared an application for certificate of convenience for operation of motor vehicles over regular route, and between fixed termini, to operate between Huntington, West Virginia, by way of Ashland, Kentucky, Portsmouth, to Columbus, Ohio, Huntington terminal Fifth avenue and Ninth street, over State Route Number Sixty to Kentucky line and immediately thereafter filed same with the state roads commission of the state of West Virginia; said state road commission of West Virginia being duly authorized and qualified to pass upon and issue certificates of convenience for operation of motor bus transportation of passengers for hire over the public ways of said state. In said application, said plaintiff falsely and fraudulently set forth that the value of the real estate then owned by him was $18,000.00; incumbrances thereon, $9500.00; net

value, $8500.00. That the value of personal property owned was $81,833.35; all debts not secured by real estate, $40,000.00; net value of personal property, $41,833.35. Net value of all property owned by him, personal and real, was $50,333.35. That in said application he has the name of applicant set forth: "Jas. P. Grubb, proposing to operate as Tri-State Transit Co."

Defendant is informed, believes and therefore alleges, that on said twenty-sixth day of January, 1928, for some time prior thereto and ever since the property owned by said James P. Grubb was not sufficient to pay his indebtedness, all of which was then, ever since and long prior thereto, well known to said James P. Grubb; that said financial statement contained in his application filed with the state road commission of West Virginia was made for the purpose of and did mislead said commission into granting him said certificate.

On the thirteenth day of March, 1928, at the time of the hearing of the application filed with the Public Utilities Commission of Ohio as hereinbefore set forth said James P. Grubb, in order to induce said commission to grant said application, filed with said commission his written financial statement, in which he falsely and fraudulently set forth that his total assets were $25,341.33, and liabilities only $9381.29. The assets of said James P. Grubb on said thirteenth day of March, 1928, long prior thereto and ever since were not of the value of $25,341.33, but of a much less value, to wit: Not to exceed $15,000.00; and his liabilities were far in excess of $9381.29, to wit: In excess of the sum of

$15,000.00; all of which was then, for a long time prior thereto, and ever since, well known to said James P. Grubb. By reason of said false affidavit said James P. Grubb procured the Public Utilities Commission of Ohio to grant him the orders and certificate set forth in his bill of complaint herein.

On the twenty-third day of January, 1928, long prior thereto, nor at any time since, has there been any corporation, organization or association known as "The Tri-State Transit Company," and the said "The Tri-State Transit Company," has no legal or other existence and is financially irresponsible, having no office, residence or place of business or person on whom service of process may be made, but said name and designation was, and is being, used by the said James P. Grubb because of the fact that it is so similar to that of this answering defendant; that its use is calculated to and will deceive the traveling public, and result in confusion, unfair, unlawful and fraudulent competition to the great and irreparable damage of this answering defendant.

This answering defendant says further that during the time said James P. Grubb was manager and had supervision of this answering defendant he was operating the same without competition of any other interstate bus line, and he then operated the same at a financial loss, all of which is well known to him. That the demands for service by interstate motor bus transportation over said route has not increased but has decreased during the latter part of said operation, and that said James P. Grubb is fully informed and knows that the proposed

operation by him cannot be financially successful as a bus operation, but the same is for the sole purpose of compelling this answering defendant and others to buy not only his tangible property and equipment but pay him a large and exorbitant price for the certificate and franchise to operate over said line.

This answering defendant says that there is not now and will not for a long time to come be sufficient passengers desiring to take interstate transportation by motor bus on or over the route described in plaintiff's petition or any part thereof to necessitate or use one-half of the facility now being furnished by this answering defendant, all of which is well known to the plaintiff herein.

This answering defendant now and for more than a year last past has had many thousands of dollars invested in busses and operating equipment used in its said business over said route and is able, ready and willing to and will continue to furnish ample facility to take care of all passengers desiring to take interstate transportation by motor bus on or over the route described in plaintiff's bill of complaint or any part thereof.

This answering defendant says that the proposed operation of said plaintiff cannot and will not earn sufficient funds with which to pay the actual expense of the operation not taking into consideration the original purchase price, upkeep and replacement of equipment, all of which is well known to said plaintiff. The highways over which plaintiff proposes to operate are the same highways and routes over which this answering defendant, and the bus operating defendants herein, are now

operating. Said highways are very narrow and are subject to very heavy and ever increasing travel. In fact, the public travel over said highways is very heavy and in many parts is congested by traffic to such an extent that the proposed operation by plaintiff will produce an unnecessary burden on said highways and will unnecessarily interfere with the traveling public thereon and will not be of any appreciable public benefit, and will interfere with the operation of this answering defendant as a common carrier, and with the public generally in the free and untrammelled use of said highways, and will greatly and unnecessarily increase the danger of loss of life and property destruction thereon.

This answering defendant says that while said plaintiff was president and general manager and had charge of the operation of the books of this answering defendant he operated the same in such an unlawful and reckless manner that it was necessary for and other operators engaged in operating a part of the same line did apply to a court of competent jurisdiction and obtain a restraining order, as did the Public Utilities Commission of Ohio, to prevent said plaintiff from violating the laws of the state and the rules and regulations of the Public Utilities Commission, for the protection of the safety of the public travel and protection of other motor bus transportation of passengers over said highways. That by reason of the premises, said plaintiff is unfit, both financially and as a bus operator, to be entrusted with the operation of motor bus transportation over the highways of the state.

This answering defendant says further that said plaintiff should not be permitted to further prosecute this action for the reason that it appears from the allegations of the bill of complaint that he has submitted the matters complained of therein to the Public Utilities Commission of Ohio, and that the Supreme Court of Ohio has jurisdiction to revise and correct any errors, if any, committed by said Public Utilities Commission, and that he has not exhausted the remedies provided for by law to obtain any and all right to which he is entitled to thereunder, and for the further reason that he is not in good faith seeking to operate interstate motor transportation of passengers, but is seeking to do the things and matters complained of, for the purposes hereinbefore set forth.

Wherefore, this answering defendant, having fully answered, prays that the temporary restraining order heretofore granted herein be dissolved, set aside and held for naught; that plaintiff be denied any other or further relief in the premises; that his petition be dismissed; that this answering defendant be adjudged to go hence and recover its costs; and for all proper relief in the premises.

Dan H. Armstrong,
Blair & Ball,
Attorneys for The Interstate Motor Transit Company,
Answering Defendant.

[Duly verified.]

AMENDMENT TO ANSWER.

[Filed November 10, 1928.]

Defendant, The Interstate Motor Transit Company, for its amendment to its answer to the bill of complaint filed herein by plaintiff, amends paragraph six of said answer so as to read as follows:

That it denies that this action is brought under the first paragraph of Section Twenty-four, as amended, of the Judicial Code of the United States for the purpose of preventing the enforcement of the order of the Public Utilities Commission of Ohio, prohibiting plaintiff, as a common carrier, from operating motor busses for hire in interstate commerce between Portsmouth, Ohio, and a place in the state of Kentucky across the bridge from said Portsmouth, Ohio, and known as South Portsmouth, Kentucky, and return, crossing and recrossing the bridge over the Ohio river connecting the said state of Ohio and Kentucky at said places; and, it further denies that said proposed operation is a part of a route from Columbus, Ohio, through the states of Ohio, Kentucky and West Virginia, to Huntington, West Virginia, more particularly described in plaintiff's bill of complaint.

It further denies that the matter and amount in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand ($3000.00) dollars.

It further denies that this action involves any question, or that it arises under Article One, Section Eight of the Constitution of the United States, which provides that congress shall have power to regulate commerce

with foreign nations and among the several states, and with the Indian tribes; and, also denies that it arises under the Fourteenth Amendment to said Constitution of the United States, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

It denies that the action of the Public Utilities Commission deprives plaintiff of life, liberty, or property without due process of law; and, it denies that the Public Utilities Commission of the state of Ohio, or the state is denying plaintiff equal protection of the laws of the land, but says, that on the contrary that the proposed operation of plaintiff across said bridge is not to a place called South Portsmouth, Kentucky, but to the end of the bridge for the sole purpose of carrying intrastate passengers from Portsmouth, Ohio, to Columbus, Ohio, and intervening points.

Wherefore, plaintiff prays as in its answer heretofore filed herein.

Dan H. Armstrong,
Blair & Ball,
Attorneys for The Interstate Motor Transit Company,
Answering Defendant.

[Duly verified.]

(Like answers were on the same day, to wit, November 10, 1928, filed by The Ohio Valley Bus Company, The Cannon Ball Transportation Company, The Portsmouth Public Service Company and The Ohio Valley Electric Railway Company.)

ENTRY.

Leave is hereby granted the defendant, the Public Utilities Commission of Ohio, to file its answer to plaintiff's amended bill of complaint instanter.

ANSWER OF THE DEFENDANT, THE PUBLIC UTILITIES COMMISSION OF OHIO.

[Filed May 13, 1929.]

1. The defendant, the Public Utilities Commission of Ohio, for its answer to plaintiff's amended bill of complaint filed herein, says that it admits that plaintiff is a citizen of the United States, of the state of Ohio, and a resident of the city of Portsmouth in said state, and denies that plaintiff proposes to and will, unless prevented by this defendant, operate an interstate bus line as a common carrier for the transportation of passengers, as set forth in paragraph 1 of said bill of complaint.

2. That it admits the allegations set forth in paragraph 2 of said bill of complaint.

3. That it admits the allegations of paragraph 3 of said bill of complaint.

4. That it admits the allegations set forth in paragraph 4 of said bill of complaint.

5. That it admits the allegations set forth in paragraph 5 of said bill of complaint.

6. That it denies that this action is brought under the eighth paragraph of Section 24 of the Judicial Code of the United States; that the action is brought for the purpose of enforcement of an order of this defendant pro-

hibiting plaintiff as a common carrier from operating motor busses for hire in interstate commerce between Portsmouth, Ohio, and South Portsmouth, Kentucky, and denies that the matter and amount in controversy exceeds, exclusive of interest and costs, the sum or value of $3000; denies that this action involves a federal question and that it arises under Section 8, Article 1 of the Constitution of the United States, and denies that it arises under the Fourteenth Amendment of said Constitution of the United States; denies that the action of this defendant deprives plaintiff of liberty or property without due process of law or that this defendant is denying plaintiff equal protection of the laws of the land but says further that the proposed operation of the plaintiff is not to the place called South Portsmouth, Kentucky, but to the end of the bridge over the Ohio river at Portsmouth, Ohio, for the sole purpose of carrying intrastate passengers to and from Portsmouth and Columbus, Ohio, and intervening points.

7. That it admits that plaintiff — under the name of The Tri-State Transit Company, on January 23, 1928, filed an application with this defendant for certificate of convenience and necessity under the laws of the state of Ohio, to operate motor busses carrying passengers for hire in interstate commerce only, between the cities of Columbus, Ohio, and Huntington, West Virginia, over the route set forth in paragraph 7 of said bill of complaint.

8. That it admits that on March 13, 1928, a hearing was duly had on said application and that an order was thereupon issued granting the application in part.

9. That it admits that the final and formal order in said matter was issued April 2, 1928, granting the application, as alleged in paragraph 9 of plaintiff's bill of complaint.

10. That it admits the allegations set forth in paragraph 10 of said bill of complaint.

11. That it denies for want of knowledge that plaintiff ordered 8 passenger busses, engaged drivers and later made arrangements preliminary to the starting of said motor bus line, and denies that plaintiff was able and willing to start said motor bus line by the eighteenth day of April, 1928.

12. That it denies that more than 4500 passengers each month leave the trains of the C. & O. Railway Company, South Portsmouth, Kentucky, to continue their travel across said bridge to their various destinations, and denies all the other allegations set forth in paragraph 12 of said bill of complaint.

13. That it denies for want of knowledge the allegations set forth in paragraph 13 of said bill of complaint.

14. That it admits that the statutes of Ohio (G. C. 614-100) impose a fine of not to exceed $1000, or imprisonment not exceeding one year, or both, such fine and imprisonment for anyone who violates or fails to comply with the statutes regulating public utilities in said state, or who fails to obey, observe or comply with any order, rule, decision, demand or requirement of this defendant; and denies all the other allegations set forth in paragraph 14 of said bill of complaint.

15. That it denies that the allegations set forth in

paragraph 15 of said bill of complaint are in violation of plaintiff's right to equal protection of the laws and contrary to the Fourteenth Amendment to the Constitution of the United States of America.

16. That it denies that the order of this defendant hereinbefore referred to is an unlawful exercise of the police powers of this defendant and of the state of Ohio, and a prohibition of interstate commerce and an unwarranted obstruction of commerce between the states, and denies that it is contrary to the "commerce clause" of the Constitution of the United States; denies that said order is contrary to the statutes of Ohio, Section 614-84 to Section 614-102, inclusive, of the General Code, and denies that there is no warrant or authority granted this defendant which would empower it to prohibit the movement of plaintiff's busses as proposed in said bill of complaint.

17. That it denies for want of knowledge the allegations set forth in paragraph 17 of said bill of complaint except that it admits that the Common Pleas Court of Scioto County, Ohio, is without jurisdiction in the subject matter of the action referred to therein.

18. That it denies that the order of this defendant is unwarranted, unlawful, oppressive, discriminatory, contrary to the laws of Ohio and the Constitution of the United States, and for want of knowledge denies the other allegations set forth in paragraph 18 of said bill of complaint.

Further answering, and by way of affirmative defense, the defendant says that the plaintiff herein on the twenty-

third day of January, 1928, filed an application with this defendant for a certificate of convenience and necessity to operate motor busses over the route set forth in plaintiff's bill of complaint; that after hearing an order was made by this defendant, as alleged by plaintiff therein; that on April 17, 1928, the plaintiff filed with this defendant an application for rehearing as to a part of the order of this defendant, which part denied and prohibited plaintiff from crossing and recrossing the Ohio river at Portsmouth, Ohio; that on the same day, to wit, April 17, 1928, said application was overruled and that thereafter on the thirty-first day of May, 1928, plaintiff herein, under the provisions of the statutes of Ohio, filed a petition in error against this defendant in the Supreme Court being cause No. 21184, in said court, containing therein the same and identical matters set forth in the bill of complaint filed herein, the assignments of error in said Supreme Court of Ohio being as follows:

"1. The commission erred in overruling and denying the application for a rehearing.

2. Said part of the order is not sustained by the evidence.

3. Said part of the order is contrary to law.

4. Said part of the order denies plaintiff in error the rights, privileges and immunities guaranteed him as a citizen of the United States under the Fourteenth Amendment of the Constitution of the United States.

5. That said part of the order is direct violation of Article 8, Section 1 of the Constitution of the United States granting power to congress to regulate commerce

among the several states, and is a prohibition of, burden on and an unlawful interference and restriction of interstate commerce.

6. That said part of the order is a violation of and contrary to Section 614-101 of the General Code of Ohio.

7. That said part of the order is contrary to the decisions of the Supreme Court of the United States and of the United States District Court, Eastern District of Kentucky in the case of Magnuson v. Kelly, Commissioner, decided December 2, 1927.

8. That said portion of said order prohibiting interstate commerce, or any movement between Portsmouth, Ohio and South Portsmouth, Kentucky, over the bridge across the Ohio river and reverse, was based upon supposed facts and evidence which were not introduced in this proceeding, which formed no part of the record in this case, and which plaintiff in error had no opportunity to meet or controvert.

9. That said part of the order is contrary to the announcement and the written notation thereof made by two sitting commissioners of defendant in error at the end of the hearing March 13, 1928.

10. For other errors appearing on the record.

11. That the part of the order prohibiting interstate movement and commece nullifies the certificate of public convenience and necessity, known as Kentucky Permit No. 2204, by which permit plaintiff in error was granted the right and privilege to move and operate in interstate commerce from South Portsmouth, Kentucky, over the interstate bridge to Portsmouth, Ohio, and reverse, said

Kentucky permit to expire April 25, 1928, unless operation begin thereunder on or before said dates."

Thereafter, following a hearing before the Supreme Court of the state of Ohio, said Supreme Court on the fourteenth day of November, 1928, in its decision rendered on said date sustained the order of this defendant, the Public Utilities Commission of Ohio, in every particular, thereby determining each and every ground of error set forth in said proceeding and that the judgment and order of the Supreme Court of the state of Ohio was not appealed and now stands unreversed and unmodified and is in full force and effect; that all matters determined in said case are now res adjudicata and that said decision of the Supreme Court of Ohio is a bar to this action, all the matters in this action having been set up and determined in proceedings in the Supreme Court of Ohio and that plaintiff herein is estopped to further prosecute this action.

This defendant says further that plaintiff herein had a full, adequate and complete remedy at law to protect himself in any and all of the matters complained of herein by causing the decision and order of the Supreme Court of Ohio to be reviewed by the Supreme Court of the United States.

Wherefore, having fully answered, this defendant prays that the temporary restraining order heretofore granted herein be dissolved; that plaintiff be denied any futher relief in the premises and that his bill of complaint be dismissed, and that this defendant be adjudged to go hence without day and to recover costs from plaintiff,

and for such other and further relief as this defendant may be entitled to.

Gilbert Bettman,
Attorney General,
T. J. Herbert,
Attorney for Public Utilities Commission of Ohio,
Attorneys for Defendants.

[Duly verified.]

ENTRY.

[Filed May 13, 1929.]

Now comes the defendants, The Inter-State Motor Transit Company, The Cannonball Transportation Company, The Portsmouth Public Service Company, The Ohio Valley Bus Company, and The Ohio Electric Railway Company, and ask leave to file their separate supplemental answers to the bill of complaint of the plaintiff.

Upon consideration whereof, leave is granted to file said supplemental answers forthwith.

SUPPLEMENTAL AND AMENDMENT TO ANSWER OF THE INSTERSTATE MOTOR TRANSIT COMPANY.

[Filed May 13, 1929.]

Now comes the defendant, The Interstate Motor Transit Company, by leave of court first had, and files its supplemental, and Amendment to, its answer heretofore filed herein, by inserting immediately after the words "for the purpose hereinbefore set forth", at the end of the first paragraph, on page thirteen, and immediately before the prayer, the following:

Defendant further answering said bill in equity, and for its supplemental answer, represents that on the twenty-third day of January, 1928, said Grubb, plaintiff herein, under the name and style of J. P. Grubb, proposing to operate The Tri-State Transit Company, applied to one of the defendants, The Public Utilities Commission of Ohio, for a certificate of convenience and necessity to operate motor transportation of passengers over public highways and streets of the state of Ohio from Columbus, Ohio, by way of route Number Twenty-three to Portsmouth, Ohio; thence by way of Chillicothe street in said Portsmouth, to Ohio-Kentucky line, crossing the Ohio river to South Portsmouth, Kentucky; and, thence returning to Portsmouth, Ohio; thence via Chillicothe street to Gallia; thence Eighth street; thence over viaduce to Gallia street; thence via Gallia street through New Boston; thence via United States Highway Number Fifty-two to the bridge across the Ohio river from Second street in the city of Ironton, Ohio, to Russell, Kentucky; thence through certain portions of Kentucky, crossing into West Virginia; thence to Huntington, West Virginia; that thereafter, on March 13, 1928, a hearing was had on said application of said Grubb by said Public Utilities Commission; that on the second day of April, 1928, said Public Utilities Commission issued its order granting the route applied by said Grubb only in part, and which order contained in substance the following:

That said commission ordered said applicant, Grubb, be and hereby is prohibited from incorporation within the regular route upon which said Grubb will operate, a

certificate to operate within the state of Ohio, any movement which shall provide for the crossing and recrossing of the Ohio river at Portsmouth, Ohio. In other words, said commission refused to grant a permit to said Grubb to cross and recross the bridge at Portsmouth, Ohio; that thereafter on April 17, 1928, said applicant, Grubb, filed with said Public Utilities Commission an application seeking for a rehearing as to said part of the order of said commission so denying and prohibiting said applicant, Grubb, from crossing and recrossing the Ohio river at Portsmouth, Ohio.

That on the seventeenth day of April, 1928, said defendant, Public Utilities Commission of Ohio, overruled said application for a rehearing, and said Grubb excepted to the overruling of said application for rehearing; thereafter, to wit: On the thirty-first day of May, 1928, said applicant, Grubb, under the provisions of the statutes of the state of Ohio permitting him to do so, filed his petition in error against said defendant, Public Utilities Commission of Ohio, in the Supreme Court of the state of Ohio, being Cause Number 21184 in said court, containing therein about the same and identical matters set out in the bill in equity herein, the assignments of error in said Supreme Court of Ohio being:

"1. The commission erred in overruling and denying the application for a rehearing.

2. Said part of the order is not sustained by the evidence.

3. Said part of the order is contrary to law.

4. Said part of the order denies plaintiff in error the

rights, privileges and immunities guaranteed him as a citizen of the United States under the Fourteenth Amendment to the Constitution of the United States.

5. That said part of the order is in direct violation of Article 8, Section 1, of the Constitution of the United States, granting power to congress to regulate commerce among the several states, and is a prohibition of, burden on, and an unlawful interference and restriction to, interstate commerce.

6. That said part of the order is a violation of and contrary to Section 614-101 of the General Code of Ohio.

7. That said part of the order is contrary to the decisions of the Supreme Court of the United States and of the United States District Court, Eastern District of Kentucky, in the case of Magnuson v. Kelly, Commissioner, decided December 2, 1927.

8. That said portion of said order prohibiting interstate commerce, or any movement between Portsmouth, Ohio, and South Portsmouth, Kentucky, over the bridge across the Ohio river and reverse, was based on supposed facts and evidence, which were not introduced in this proceeding, which formed no part of the record in this case, and which plaintiff in error had no opportunity to meet or controvert.

9. That said part of the order is contrary to the announcement and the written notation thereof made by two sitting commissioners of the defendant in error at the end of the hearing March 13, 1928.

10. For other errors appearing on the record.

11. That the part of the order prohibiting interstate

movement and commerce nullifies the certificate of public convenience and necessity, known as Kentucky Permit No. 2204, by which permit plaintiff in error was granted the right and privilege to move and operate in interstate commerce from South Portsmouth, Kentucky, over the interstate bridge to Portsmouth, Ohio, and reverse, said Kentucky permit to expire April 25, 1928, unless operation begin thereunder on or before said date."

Thereafter, such proceedings were had in said court that said cause came on for hearing before the Supreme Court of the state of Ohio, on October 3, 1928, and the same was fully argued and presented to said court on behalf of said Grubb; that thereafter, said Supreme Court, on the fourteenth day of November, 1928, made its findings, order, and ruling, sustaining the order of said Public Utilities Commission in the granting of said application, and in the inserting therein of the clause, hereinbefore set out, prohibiting said Grubb from crossing the Ohio river at Portsmouth, Ohio, as a part of his said route; and, said Supreme Court overruled each, every and all, of the assignments of error on behalf of said Grubb, which is hereinbefore set out; and, which, said judgment and order of the Supreme Court of the state of Ohio, is unappealed from, unreversed, unmodified, and is in full force and effect; and, which said judgment was procured by the applicant, Grubb, plaintiff herein, and is res judicata, and is a bar to this action, and also said Grubb is estopped to further prosecute the present action.

This answering defendant further represents that by reason of all and singular the matters hereinbefore set

forth in its supplemental and answer, that the plaintiff should not be permitted to further prosecute this action, for that said Grubb has a full, adequate, and complete remedy by law to protect himself, in any and all of the matters complained of in said bill in equity, by causing the decision and order of the Supreme Court of Ohio to be reviewed by the Supreme Court of the United States.

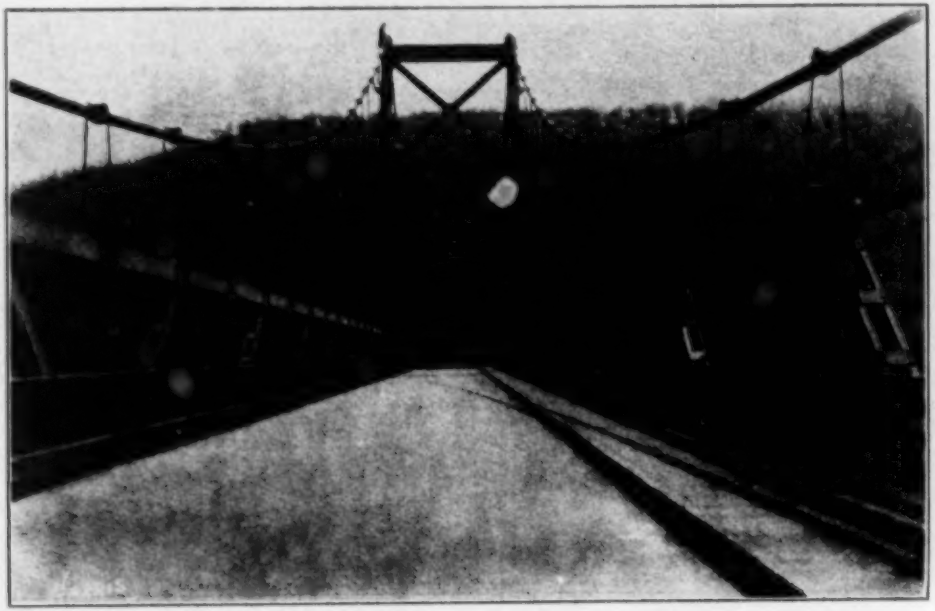
Wherefore, this answering defendant prays as in its original answer.

Dan H. Armstrong,
Blair & Ball,
Attorneys for The Interstate Motor Transit Company.

[Duly verified.]

(Like supplemental and amendments to answere were filed by the appellees, The Cannon Ball Transportation Company, The Portsmouth Public Service Company and The Ohio Valley Bus Company.)

DEFENDANT'S EXHIBIT "A."



PLAINTIFF'S EXHIBIT A-2.

General Code.

Sec. 543. After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in said action or proceeding and specified in the application for rehearing, and the commission may grant and hold such rehearing on said matters, if in its judgment sufficient reason therefor be made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless such corporation or person shall have made, before the effective date of said order or decision, application to the commission for a rehearing. Such application shall set forth specifically the ground or grounds on which the applicant considers said decision or order to be unreasonable or unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in said application. Any application for a rehearing made ten days or more before the effective date of the order as to which a rehearing is sought, shall be either granted or denied before such effective date, or the order shall stand suspended until such application is granted or denied. Any application for rehearing made within less than ten days before the effective date of the order as to which a rehearing is sought, and not

granted within twenty days, may be taken by the party making the application to be denied, unless the effective date of the order is extended for the period of the pendency of the application.

If an application for a rehearing be granted without suspension of the order involved, the commission shall forthwith proceed to hear the matter with all dispatch and shall determine the same within twenty days after final submission and if such determination is not made within said time, it may be taken by any party to the rehearing that the order involved is affirmed. An application for rehearing shall not excuse any corporation or person from complying with an obeying any order or decision, or any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the commission may by order direct. If, after such rehearing and a consideration of all the facts, including those arising since the making of the order or decision, the commission shall be of the opinion that the original order or decision or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate, change or modify the same. An order or decision made after such rehearing, abrogating, changing or modifying the original order or decision shall have the same force and effect as an original order or decision, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order or decision unless so ordered by the commission.

Sec. 544. A final order made by the commission shall be reversed, vacated or modified by the Supreme Court, on a petition in error, if upon consideration of the record such court is of the opinion that such order was unlawful and unreasonable.

Sec. 545. The proceeding to obtain such reversal, vacation or modification shall be by petition in error, filed in the Supreme Court, by any party to the proceeding before the commission, against the Public Utilities Commission of Ohio, setting forth the errors complained of. Thereupon unless the same is duly waived a summons shall issue and be served, as in other cases, upon the chairman of the commission, or, in the event of his absence, upon any member of the commission, or by leaving a copy at the office of the commission at the city of Columbus. The court may permit any interested party to intervene by cross-petition in error.

Section 549. No court other than the Supreme Court shall have power to review, suspend or delay any order made by the commission, or enjoin, restrain or interfere with the commission or any member thereof in the performance of official duties. Nor shall the writ of mandamus be issued against the commission or any member thereof by any court other than the Supreme Court.

PLAINTIFF'S EXHIBIT D.

Finding of the Public Utilities Commission.

This day, after full hearing, due notice of the time and place of which was given by publication and otherwise as provided by law, this matter came on for consideration upon the application of the said J. P. Grubb, an individual doing business as The Tri-State Transit Company, for a certificate to operate a motor transportation company carrying passengers, as a common carrier, between Columbus, Ohio, and the Ohio-Kentucky state line, (ultimate destination Huntington, West Virginia), over the route set forth and described in said application and the

exhibits appended thereto, a detailed statement and description of the motor propelled vehicles to be used, and a proposed schedule of operations and rates and charges for such service.

The commission, being fully advised in the premises, finds that a certificate should be granted for operation in interstate service solely, by said applicant upon and over that part of the proposed route set forth in said application, as follows, to wit:

> Leave Columbus, Ohio, from terminal located on East Rich street, thence via Rich street to South Third street; thence to Whittier street; thence to High street; thence to corporate line; thence via United States Highway No. 23 to the county line of Franklin and Pickaway counties; thence via same highway to and through South Bloomfield and Circleville to the county line of Pickaway and Ross counties; thence via same highway to and through Hopetown to the corporate line of Chillicothe; thence via Bridge street to Water street; thence to Paint street and thence to corporate line; thence via United States Highway No. 23 to and through Massieville and Alma to the county line of Ross and Pike counties; thence via same highway to and through Waverly, Piketon, Sargents and Wakefield to the county line of Pike and Scioto counties; thence via same highway to and through Portsmouth and New Boston and, via United States Highway No. 52 to and through Wheelersburg, Franklin Furnace and Haverhill to the county line of Scioto and Lawrence counties; thence via same highway (which is also State Route No. 7) to and through Hanging Rock to the corporation line of Ironton; thence via Second street to bridge, crossing river to Russell, Kentucky (final destination, Huntington, West Virginia), and reverse.

And the commission, coming now to consider said application wherein is asked the certification as a part of the aforesaid route, the divergence therefrom, in the city of Portsmouth, Ohio, along Chillicothe street to the bridge over the Ohio river, across said bridge to South Portsmouth, Kentucky, and return to a point of joinder with the aforesaid route in said city of Portsmouth, Ohio, hereby further finds:

That, "In re: Citation of The Interstate Motor Transit Company" decided May 10, 1927, (Annual Report 1927, p. 98), which decision it may be noted in passing was not appealed to the Supreme Court of Ohio, this commission says:

"For some months at least and at present—a joint operation with a company known as the L. & L. Bus Line has been conducted through which passengers carried to Portsmouth, Ohio, by the defendant may be sold tickets by that company entitling them to be transported on the L. & L. Bus Line to Fullerton, Kentucky, a village just across the Ohio river from Portsmouth, Ohio.

"It appears that persons desiring to ride on The Interstate Motor Transit Company busses from Portsmouth, Ohio, to Columbus, or other points in Ohio, are directed by employees of the defendant company to take the L. & L. bus—which operates from the same station as does the defendant—to Fullerton, Kentucky, and that after a run of a few hundred feet, or yards at most; on the Kentucky side passengers are sold tickets to Columbus, Ohio, or to any other point in Ohio on the defendant's route. The same L. & L. bus then returns to the Ohio shore and discharges its passengers at the starting point in Portsmouth, Ohio, where they board the busses of the defendant for points within the state of Ohio.

"The commission cannot fail to take judicial notice of the fact that Fullerton, Kentucky, is a small

village; that its inhabitants could have little business to transact in Columbus, Ohio, or in Ohio cities generally, with the possible exception of Portsmouth, Ohio, and that very few people from that Kentucky community would have occasion to use the defendant line, and those only at infrequent times; that Portsmouth, Ohio, is a large thriving city, having much in common with the other Ohio towns and cities served by the defendant, and having special interest in Columbus, Ohio, the capital of the state, and that many people travel daily between these places.

"The testimony in the case will admit of but one conclusion, namely, that practically every passenger who boards the defendant's bus at Columbus and other Ohio cities, buying a ticket for Fullerton, Kentucky, is in fact going to Portsmouth, Ohio, and never transfers to the L. & L. line. It is equally apparent that those persons who are directed to and do take the L. & L. bus for a ride just over the Kentucky line only to be returned to Portsmouth to mount the defendant's busses for Ohio destination are really not interstate passengers but intrastate passengers. The commission holds that the so-called joint operation is a subterfuge and finds that the defendant by this maneuver is merely evading the Ohio statutes which require the securing of a certificate of public convenience and necessity in order to legally engage in intrastate motor transportation."

That the said proposed divergence by the applicant in the city of Portsmouth, Ohio, to a point immediately outside of the state of Ohio, and the prompt return to Portsmouth is clearly for the purpose of creating another such subterfuge and evading the statutory requirement of the procurement of a certificate to engage in intrastate motor transportation service within the state of Ohio, and

That the said J. P. Grubb proposing to do business as the Tri-State Transit Company is the same J. P. Grubb who was president of and also manager

of said The Interstate Motor Transit Company when the same was declared by this commission to be a subterfuge intrastate transportation operator, and that the proposed crossing and recrossing of the Ohio-Kentucky state line is at the same identical point where the said J. P. Grubb's company was then crossing and recrossing, and

That this commission is of the opinion that such proposed crossing and recrossing will serve only a subterfuge purpose and that such can be prevented only by denying the right to so operate, and

That, for such reason, said application, in so far as it asks the inclusion within the regular route to be operated upon by the said applicant of the crossing and recrossing of the Ohio river at Portsmouth, Ohio, should be, and hereby it is denied.

It is, therefore,

Ordered, that the said applicant be, and hereby he is prohibited from incorporating within the regular route upon which he will herein be granted a certificate to operate within the state of Ohio, any movement which shall provide for the crossing and recrossing of the Ohio river at Portsmouth, Ohio. It is further

Ordered, that, effective thirty days herefrom and upon the payment to the treasurer of state of the taxes prescribed for the motor vehicles to be used, a certificate be granted said applicant to operate a motor transportation company carrying passengers, as a common carrier, in interstate service only, over such part of the proposed route as is hereinbefore found to be proper, and between said termini with said motor propelled vehicles and according to said schedules, subject to the rules and regulations of this commission and conditioned that local sub-

divisions may make reasonable local police regulations within their respective boundaries not inconsistent with the provisions of Sections 614-54 to 614-102 of the General Code of Ohio. It is further

Ordered, that no change be made in said vehicles, said time schedule or said tariff of rates and charges until the same has been authorized, upon proper application, by the further order of this commission.

PLAINTIFF'S EXHIBIT F.

Order of the Public Utilities Commission.

This day, this matter came on for further consideration upon the application of the applicant, the said J. P. Grubb, praying such amendment of the order, made and entered herein upon April second, 1928, as will vacate and set aside the following prohibition, to wit:

"Ordered, that the said applicant be, and hereby he is prohibited from incorporating within the regular route upon which he will herein be granted a certificate to operate within the state of Ohio, any movement which shall provide for the crossing and recrossing of the Ohio river at Portsmouth, Ohio"

and for the amendment of the certificate granted by said order, aforesaid, to include therein a divergence at Portsmouth to South Portsmouth in the state of Kentucky, and return.

The commission, being fully advised in the premises, finds that such application for the amendment of said order of date April second, 1928, in the matters aforesaid, should be, and hereby the same is denied.

To which action of the commission in denying his said application for the amendment of said order of date April second, 1928, the said J. P. Grubb then excepted and here now excepts, and his exceptions here are noted of record.

PLAINTIFF'S EXHIBIT G.

Order of the Public Utilities Commission.

This day this matter came on for further consideration upon the application of the applicant, J. P. Grubb, asking a rehearing with respect to that part of the order, made and entered herein on April 2, 1928 (as amended April 6, 1928), which denies the certification of the part of the applicant's proposed route referred to in the following provision of said order, and as to the following provision of said order to wit:

"Ordered, that the said applicant be, and hereby he is prohibited from incorporating within the regular route upon which he will be granted a certificate to operate within the state of Ohio, any movement which shall provide for the crossing and recrossing of the Ohio river at Portsmouth, Ohio"

for the reasons and upon the grounds set forth in said application.

The commission, being fully advised in the premises, finds that sufficient cause has not been made to appear in said application for a rehearing of said proceeding. It is, therefore,

Ordered, that the said application of the said J. P. Grubb, asking a rehearing with respect to the matters and things aforesaid, for the reasons and upon the grounds set forth therein, be, and hereby it is denied.

To which order of the commission denying his said application for a rehearing, the said J. P. Grubb then excepted and here now excepts, and his exceptions here are noted of record.

ENTRY.

[Filed June 6, 1929.]

It is hereby ordered that the decision and opinion of the Ohio Supreme Court in number 21098, The Interstate Motor Transit Company, a Corporation, et al., plaintiff in error, v. The Public Utilities Commission of Ohio, and number 21184, J. P. Grubb, etc., plaintiff in error, v. The Public Utilities Commission of Ohio, decided November 14, 1928, 119 O. S., 264, be, and the same is hereby admitted in evidence and a part of the record in this case. It is further ordered that this entry be made and filed as of May 18, 1929.

OPINION OF SUPREME COURT.

Kinkade, J.:

1. The Public Utilities Commission, when considering an application for an interstate certificate of necessity and convenience, is not confined entirely to the terms of the application filed and to the testimony of the applicant concerning his ability to furnish the transportation in question and his intention to comply with the provisions of law and the rules promulgated by the commission. The commission may receive any competent evidence offered bearing on the question of the good faith of the applicant, and in this respect may take into account facts known to the commission as evidenced by its own records, with respect to prior conduct of the same applicant under different certificates issued to him for motor bus transportation over the highways of the state;

and when a consideration of all the evidence on that subject makes manifest the fact that the applicant is seeking a certificate with respect to any portion of his route for the purpose of enabling him, while actually operating under an interstate certificate, to carry intrastate passengers, the same as though he were operating under an intrastate certificate, the commission may deny his application with respect to any portion of the route designated.

2. The fact that the commission announces orally that an application will be granted as applied for, supplemented by the further fact that the commission then enters upon the files of the case a memorandum in like effect, does not bar the commission from a further investigation of the case or from modifying the entry made upon the files of the case when the commission comes to issue its formal and final certificate to the applicant.

(Nos. 21098 and 21184—Decided November 14, 1928.)

Error to the Public Utilities Commission.

The facts are stated in the opinion.

These two proceedings in error were heard together in this court, and will be disposed of in one opinion.

The plaintiff in error in case No. 21184, J. P. Grubb, doing business as The Tri-State Transit Company, filed an application with the Public Utilities Commission for a certificate to operate an interstate motor bus line between the city of Columbus, Ohio, and the city of Huntington, W. Va., and return. The route designated in the application passed through the border cities of Portsmouth and Ironton, Ohio, crossed the Ohio river at Iron-

ton to Russell, Ky., and thence through the state of Kentucky and West Virginia to Huntington. The route also embraced a short side loop from Portsmouth, Ohio, to South Portsmouth, Ky., and return to the main route at Portsmouth. The principal contention here arises out of the action of the commission with respect to this side loop between Portsmouth and South Portsmouth.

The plaintiffs in error in case No. 21098 filed protests, stating many reasons why Grubb's application should be denied by the commission. They averred that no necessity existed for supplementing the service then being rendered over the route in question by other transportation companies then duly operating over that route, claiming that such existing service was not only ample, but more than ample, to meet every convenience and necessity of the traveling public; that Grubb's application was not made in good faith, but was a mere scheme and subterfuge to compel other operators to purchase their peace against ruinous competition and unfair operation by Grubb in the carrying of intrastate passengers, while pretending to operate as a carrier of interstate passengers only, and in this respect they insisted that the side loop from Portsmouth to South Portsmouth and return was sought for no other purpose except to enable Grubb, by the mere trick of carrying Portsmouth citizens to South Portsmouth and back, thereby to change them from intrastate to interstate passengers, and to then carry them to and from any other points in Ohio in all respects as he might do were he operating under an intrastate certificate.

These protestants asked the commission to suspend hearing upon the application until they could prosecute injunction actions in the federal or other courts, and procure a restraining order against the commission. This the commission declined to do, and proceeded with the hearing of the application. Grubb testified concerning his ability to render the service and his disposition and intention to comply with all proper regulations required by law or by the rules promulgated by the commission. He denied all allegations made against him by the protestants to the effect that he was seeking only to blackmail them into buying him out.

Counsel for Grubb contend that, as he was asking only for an interstate certificate, the commission was without jurisdiction to inquire into the truth or falsity of most of the allegations of the protestants as to bad faith on the part of Grubb in seeking this certificate. The commission sustained this contention of counsel for Grubb in the main, holding that the questions were federal in character, and must be passed on by the federal authorities, and that jurisdiction of the commission was very limited and well defined by the decisions with respect to interstate carriers.

The protestants outlined in a general way to the commission the character of evidence they wished to offer, and asked to be afforded time to prepare the same so it could be offered; but the commission held and ruled that such evidence would be irrelevant, immaterial, and incompetent for want of jurisdiction of the subject-matter. No such evidence was in fact offered.

The protestants then sought to make their case by the cross examination of Grubb, covering the same features of the case. This the commission declined to permit, for the same reasons. Exceptions were duly saved.

The hearing was before only two of the commissioners. At the close of the hearing the two commissioners announced orally that the application would be granted as prayed for, and, following this announcement, and immediately thereafter, a written memorandum to the same effect was placed on the files of the case, and both commissioners affixed their signatures thereto, but no formal certificate was then issued. The date at which the certificate was to take effect was stated.

Later the commissioners further considered the application, and determined to grant the application, but not to grant that part of the application covering the side loop from Portsmouth to South Portsmouth and return, and that part of the application was denied.

The commission, in this further consideration of the application, took notice of other facts within their records and knowledge by reason of former actions tried against Grubb for violation of the regulations of the commission while operating other motor bus lines in this same territory and by reason of these facts, the commission found that Grubb's present application, in so far as it embraces the side loop to South Portsmouth and return, was a subterfuge, as claimed by the protestants, and therefore should be denied. To the latter action Grubb excepted, and prosecutes error in this court to secure a reversal of the action by the commission. It is contended that there

is no evidence on which to base this last finding of the commission, and furthermore, it is claimed that the commission exhausted its power over the matter when it announced orally that the application would be granted, which was further confirmed by the signed memorandum on the files of the case, and we are now asked to order the commission to issue the certificate in accord with that announcement and memorandum. It is claimed that the action of the commission was final, and nothing remained, except the ministerial act of issuing the formal certificates.

We can not agree that the authorities cited by counsel sustain this proposition. True, this court has said that, when such action was taken by the commission, it need not go forward forthwith and issue the formal certificate at once, but that may be done at a later date, and that the certificate when issued will complete and finish out that which was orally announced and entered on the files of the case; but that falls very far short of saying that the commission, by making such announcement and memorandum, thereby bars itself from all right to further consider the case before issuing the formal and final certificate.

Our attention is called to another decision of this court, holding that, when a regular certificate is applied for, and a regular route certificate is in fact granted, the commission may not at a later date, by a nunc pro tunc entry, change that which was done from a regular to an irregular route, by merely saying that it was the intention of the commission to issue a certificate for an ir-

regular instead of a regular route, and this court ordered the commission to restore its first entry, the regular route. The office of a nunc pro tunc entry is not to change what the court or commission in fact did and recorded, but is to record that which was in fact done, but was not recorded. That case has no application here.

The finding of fact by the commission as to the intent and purpose of Grubb in seeking this side loop from Portsmouth to South Portsmouth and return was amply sustained by the records of the commission and we see no error in the action of the commission denying that part of the application.

The protestants insist that the commission was in error in granting the remainder of the application because it is not sustained by sufficient evidence, and is clearly against the weight of the evidence. The evidence is not here for the consideration of this court. True, the protestants say it was excluded by the commission on jurisdictional grounds, but that, had the evidence tendered been admitted, it would have established that Grubb was not entitled to the certificate covering any part of the route designated in his application. The record does not make manifest what the rejected evidence would have been had it been received. That being true, this court can not find that the commission committed prejudicial error by rejecting the evidence. The finding and order of the commission is affirmed.

Order affirmed.

Marshall, C. J., and Day, Allen, Robinson, Jones, and Matthias, JJ., concur.

ENTRY.

This cause came on for further hearing upon the answer of the Public Utilities Commission of Ohio, the amended and supplementary answers of The Interstate Motor Transit Company, The Cannonball Transportation Company and The Ohio Valley Bus Company, which defendants in order to support the allegations of their answer and amended and supplementary answers respectively, offered as evidence in said cause, Exhibit No. X-1, being a certified copy of the mandate of the Supreme Court of the state of Ohio in cause No. 21184, in said court and styled J. P. Grubb, D. B. A. The Tri-State Transit Company Interstate v. The Public Utilities Commission of Ohio, et al., which exhibit was received by the court and admitted as a part of the record of this cause.

To the admission of said Exhibit No. X-1 plaintiff objected as being incompetent and being offered in evidence on the eighteenth of May, 1929, which is subsequent to the offering of the remaining evidence in the case, and after the final decision of the Supreme Court of Ohio, is incompetent and improper as to time of offering and its reception in evidence.

MANDATE OF THE SUPREME COURT.

[Filed May 18, 1929.]

This cause came on to be heard upon the transcript of the record of the Public Utilities Commission of Ohio and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the order of the

said Public Utilities Commission of Ohio be, and the same is hereby, affirmed for the reasons stated in the opinion filed in this case; and it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

It is further ordered that the defendant in error recover from the plaintiff in error their costs herein expended taxed at $.....

Ordered, that a special mandate be sent to the Public Utilities Commission of Ohio, to carry this judgment into execution.

I, Seba H. Miller, clerk of the Supreme Court of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

Witness my hand and the seal of said court this sixteenth day of May, A. D. 1929.

Seba H. Miller, Clerk.

[Seal.] By L. J. Corcoran, Deputy.

To the Honorable Public Utilities Commission of Ohio, Greeting:

We do hereby command you, that you proceed, without delay, to carry the within and foregoing judgment of our Supreme Court of Ohio, in the cause of J. P. Grubb, d. b. a. Tri-State Transit Co. Interstate v. The Public Utilities Commission of Ohio into execution, the petition in error herein and heretofore granted, to the contrary notwithstanding.

Witness, Seba H. Miller, clerk of said Supreme Court of Ohio, at Columbus, this sixteenth day of May, A. D. 1929.

Seba H. Miller, Clerk.

[Seal.] By L. J. Corcoran, Deputy.

FINDING.

[Filed May 18, 1929.]

Before Moorman and Hickenlooper, Circuit Judges, and Hough, District Judge:

The plaintiff, J. P. Grubb, filed his complaint in equity, to restrain and prevent the enforcement of an order of the Public Utilities Commission of Ohio, which order prohibited plaintiff as a common carrier from operating motor busses for hire in interstate commerce between Portsmouth, Ohio, and South Portsmouth, Ky., and return, crossing and recrossing the bridge over the Ohio river, connecting said municipalities, which was part of a route from Columbus, Ohio, through the states of Ohio, Kentucky and West Virginia; and for further enjoining all the defendants from interfering with the operation of plaintiff's automobile busses while travelling said route, and particularly crossing and recrossing the river bridge and approaches thereto between Portsmouth, Ohio, and South Portsmouth, Ky. The suit is brought under paragraphs 1 and 8 of Section 24, as amended, of the Judicial Code of the United States. He claims that the order of the Public Utilities Commission of Ohio is an unlawful exercise of police powers, and is a prohibition of interstate commerce and an unwarranted obstruction of commerce between states and contrary to the commerce clause of the Constitution of the United States, to wit: Section 8 of Article 1 of said Constitution.

On January 23, 1928, Grubb filed application with the Public Utilities Commission of Ohio, for a certificate of

convenience and necessity, descring in detail the route above mentioned, which application was heard by the commission on March 13, 1928. On April 2, 1928, the application was granted and allowed by the commission, except the loop from Portsmouth, Ohio, across the river bridge to South Portsmouth, Ky., and return, which was by said order in effect disallowed. Subsequently an application for a rehearing was filed, and on the seventeenth of April, 1928, this application was overruled.

The plaintiff began this suit on the twentieth of April, 1928, and on May 31, 1928, he filed in the Supreme Court of Ohio his petition in error, seeking to reverse the Public Utilities Commission in its refusal to permit him to cross and recross the bridge between Portsmouth and South Portsmouth (544 G. C.). Among other errors complained of in the petition in error, the plaintiff says that the part of the order of the commission refusing permission to cross and recross between the two municipalities is contrary to law, and that it denies to him the rights, privileges and immunities guaranteed him as a citizen of the United States under the Fourteenth Amendment to the Constitution of the United States, and is in direct violation of Section 8, Article 1 of the Federal Constitution granting power to congress to regulate commerce among the several states, and is a prohibition of, burden on, and an unlawful interference and restriction to, interstate commerce.

The review to the Supreme Court of Ohio was argued and submitted to that court on October 3, 1928, and on November 14, 1928, the Supreme Court affirmed the Public Utilities Commission.

The defendants in this case other than the Public Utilities Commission and except the public peace officers named as defendants, filed their answers to the bill of complaint, denying among other things the unlawfulness and unconstitutionality of the action and final order of the commission, wherein it failed and refused to include in the certificate of convenience and necessity, issued, that part of the route applied for over the river bridge and between Portsmouth and South Portsmouth. The case was heard by the court upon the pleadings, proof, and argument, and taken under advisement.

Subsequently, and after the announcement of the decision of the Supreme Court of Ohio, the defendants asked and were granted leave to file their separate supplemental answers, and the defendant Public Utilities Commission, upon leave granted, filed its original answer, all pleading the decision and judgment of the Supreme Court of the state upon review of the finding and order of the Public Utilities Commission.

Later, a further hearing was had in the instant case, wherein evidence was offered and received, substantiating the allegations of the supplemental answers. There is then before this court, the transcript and record of the case that was before the Supreme Court, and upon which that court arrived at its judgment.

We are therefore confronted with the question as to whether the disposition of the case by the Supreme Court, (Grubb, etc., and Interstate Motor Transit Co. v. Public Utilities of Ohio, 119 O. S., 264) is a bar in this court, —that is to say, whether that court's judgment is res

adjudicata or an estoppel in this court. This question is entirely independent of the question of the jurisdiction of this court and one lately made by supplemental pleading and proof.

It is urged by the plaintiff that after the final action of the Board of Public Utilities, he was entitled to choose his own forum. We may assume that he is correct in that view, but it seems that he has gone further and chosen more than one forum. He selected this court on April 20, when he filed his bill of complaint, and then chose the Supreme Court of Ohio when he filed his petition in error on May 31. As to the latter selection, his right to review is provided by Section 544, G. C., as follows: "A final order made by the commission shall be reversed, vacated, or modified by the Supreme Court on a petition in error, if upon consideration of the record such court is of the opinion that such order was unlawful and unreasonable."

The high court of the state neither reversed, vacated, or modified the final order of the commission,—but instead affirmed it. This means that it found the acts of the commission lawful and reasonable. Nor can it be said that the court did not have before it the question of the lawfulness of the order in view of the fact that the plaintiff's petition in error in his assignments of error made the allegation both that the final order of the commission in eliminating the loop, was contrary to the law and contrary to the guarantees contained in the Federal Constitution, as mentioned above. And, although that court in its opinion (119 O. S., 264) failed to deal with the

illegality of the commission's action and findings in relation to the constitutional guarantees and limitations, yet the power and duty given it by the statute in such cases and the raising of that question by the plaintiff in his pleadings, results in the conclusion that the Supreme Court passed upon all questions that were before it, and its judgment must be interpreted to include a finding that the acts and orders of the commission were such as not to invade the constitutional rights of the plaintiff Grubb.

The doctrine of estoppel by judgment or res adjudicata as a practical matter proceeds upon the principles that one person shall not a second time litigate with the same person, or with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controversy or issue, which has been necessarily tried and finally determined upon its merits by a court of competent jurisdiction in a judgment in personum in a former suit. U. S. v. California Bridge Co., 245 U. S., 337, 341; Hopkins v. Lee, 6 Wheat, 109, 113; Southern Pacific Co. v. U. S., 168 U. S., 1, 48; Biglow v. Old Dominion Cooper Mining Co., 225 U. S., 111, 127.

As is said by the Federal Supreme Court in the case of Postal Telegraph Cable Co. v. The City of Newport, 247 U. S., 464, 476,—"The doctrine of res adjudicata rests at bottom on the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate, the same matter in a former action in a court of competent jurisdiction."

Nor can a fact or right distinctly adjudged be disputed

in a subsequent action between the same parties, even upon another demand, and although the original determination was reached upon an erroneous view or application of the law. U. S. v. Moser, 266 U. S., 236.

The court of this District (Donahue, Circuit Judge, Sater and Hickenlooper, District Judges sitting) had before it the question of res adjudicata in the case of Van Wert Gas Light Co. v. Public Utilities Commission, 299 F., 670, wherein that court found that the doctrine of res adjudicata did not apply,—but on page 675 of its opinion, made the following pertinent observations: "At the time of these error proceedings, however, there had been no confiscatory act, because the rate had not been fixed, and non constat, the commission would still fix a rate which would afford a reasonable return upon the larger value of plaintiff's property, and no federal question had theretofore arisen which would permit the issuance of a writ of error from the Supreme Court of the United States to the Supreme Court of Ohio. The question is therefore presented whether, even assuming the absence of the right to prosecute error, the complainant is nevertheless estopped by the judgment of the Supreme Court of Ohio to again litigate the question of valuation in another court, either directly or as a part of a broader cause of action involving it. Had this matter of valuation been the subject of judicial review in the Supreme Court of Ohio, and such finding of the Public Utilities Commission on this question been affirmed, an estoppel by judgment would arise, which would preclude the re-examination of this question in any other tribunal, as between these same

parties. Such judicial examination of the question would operate as an estoppel as to every issue and point controverted, upon the determination of which the judgment of the court was rendered."

The procedure provided by Section 544, G. C., and adopted by the plaintiff in bringing his case before the Supreme Court for reviewing, brought to that court a judicial issue to be tried by a judicial tribunal. Hocking Valley Ry. Co. v. Public Utilities Commission, 100 O. S., 321. In exercising revisory jurisdiction of the proceedings of the administrative board, that court by its own interpretation, exercised judicial functions.

The Public Utilities Commission is a defendant in both cases; the other answering defendants in the instant case are competing transportation companies, who were protestants before the Public Utilities, and who thereafter filed proceedings in the Supreme Court to review the final order of the commission. This case was consolidated with the Grubb case in the Supreme Court, and decided under the same opinion of the court. (119 O. S., 264.) Therefore there is an identity of parties in the litigation in both courts, and as we have seen from the discussion above, there is also an identity of subject matter. Nor can there be any question concerning the jurisdiction of the Supreme Court or of this court. The elements are all present to put in effect the doctrine of estoppel or res adjudicata.

The fact that the instant case was begun in this court prior to the institution of the proceedings in error in the Supreme Court will not preclude application of the doc-

trine of estoppel. Chicago, Rock Island & Pacific Ry. Co. v. Schendel, Admr., 270 U. S., 611. It is the fact that the proceeding in error in the Supreme Court developed into a final judgment while the case in this court was still pending, with all the necessary elements of the doctrine present, that constitutes the bar.

The case is dismissed at the cost of the complainant.

ENTRY DISMISSING BILL OF COMPLAINT, AMENDMENT TO BILL OF COMPLAINT AND DISSOLVING TEMPORARY RESTRAINING ORDER.

[Filed June 19, 1929.]

This cause came on to be heard before Honorable Charles H. Moorman, and Honorable Smith Hickenlooper, judges of the United States Circuit Court of Appeals, and Honorable Benson W. Hough, judge of the United States District Court, organized as provided by Section 266 of the Judicial Code of the United States, and the court, upon the pleadings and evidence, and upon the briefs and arguments of counsel, and being duly advised in the premises, entirely independent of the question of the jurisdiction of this court, finds, upon the issues that the affirmance by the Ohio Supreme Court, (Interstate Motor Transit Company, and Grubb, etc. v. Public Utilities Commission of Ohio, 119 O. S., 264) of that part of the order made and promulgated by the Public Utilities Commission of Ohio, defendant herein, April 2, 1928, denying and prohibiting plaintiff from moving his busses in crossing and recrossing the Ohio river, at Portsmouth, Ohio, between the states of Ohio and Kentucky, is, as inter-

preted by this court, res adjudicata or an estoppel in this court, and is a bar in this court, and therefore, this court finds in favor of the defendant, the Public Utilities Commission of Ohio, and the defendants, The Cannonball Transportation Company, The Portsmouth Public Service Company, The Ohio Valley Electric Railway Company, The Interstate Motor Transit Company, and that the bill of complaint and amendment to the bill of complaint, should be, and are, hereby dismissed, at plaintiff's costs. To which findings, plaintiff, by his counsel, excepts, and his exceptions are noted.

It is therefore ordered, adjudged and decreed that the defendants, each, every, and all go hence without day, that the temporary restraining order heretofore allowed in this case be, and the same is hereby dismissed; and that the bill of complaint and amendment to the bill of complaint, be, and the same are hereby dismissed. and that plaintiff pay the costs of this proceeding taxed at $....., to all of which findings, order, judgment and decree, plaintiff by his counsel, excepts, and his exceptions are here noted of record.

And plaintiff having given notice of his intention to appeal this cause direct to the Supreme Court of the United States, it is further ordered that the operation of this decree dismissing plaintiff's bill of complaint and amendment to the bill of complaint, and the dissolution of the temporary restraining order heretofore issued and entered herein be, and hereby is, suspended for the period of 30 days, to enable plaintiff to perfect his direct appeal to the Supreme Court of the United States, and no further bond need be given by plaintiff pending this suspension.

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preted by this court, res adjudicata or an estoppel in this court, and is a bar in this court, and therefore, this court finds in favor of the defendant, the Public Utilities Commission of Ohio, and the defendants, The Cannonball Transportation Company, The Portsmouth Public Service Company, The Ohio Valley Electric Railway Company, The Interstate Motor Transit Company, and that the bill of complaint and amendment to the bill of complaint, should be, and are, hereby dismissed, at plaintiff's costs. To which findings, plaintiff, by his counsel, excepts, and his exceptions are noted.

It is therefore ordered, adjudged and decreed that the defendants, each, every, and all go hence without day, that the temporary restraining order heretofore allowed in this case be, and the same is hereby dismissed; and that the bill of complaint and amendment to the bill of complaint, be, and the same are hereby dismissed. and that plaintiff pay the costs of this proceeding taxed at $....., to all of which findings, order, judgment and decree, plaintiff by his counsel, excepts, and his exceptions are here noted of record.

And plaintiff having given notice of his intention to appeal this cause direct to the Supreme Court of the United States, it is further ordered that the operation of this decree dismissing plaintiff's bill of complaint and amendment to the bill of complaint, and the dissolution of the temporary restraining order heretofore issued and entered herein be, and hereby is, suspended for the period of 30 days, to enable plaintiff to perfect his direct appeal to the Supreme Court of the United States, and no further bond need be given by plaintiff pending this suspension.

ORDER ALLOWING APPEAL.

[Filed July 10, 1929.]

On motion of counsel for the plaintiff, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibit, stipulations, and all proceedings be forthwith transmitted to said Supreme Court of the United States. It is further ordered that the bond on appeal be fixed at the sum of twenty-seven hundred dollars ($2700.00), the same to act as a supersedeas bond and also as a bond for cost and damages on appeal. It is further ordered that the citation on appeal to be issued herein be served on the defendants named in the notice of appeal, or on their attorneys of record.

Dated July 10, 1929.

SUPERSEDEAS ENTRY.

[Filed July 10, 1929.]

This cause coming on to be heard this tenth day of July, 1929, upon the application of the appellant for an appeal to the Supreme Court of the United States, and said appeal having been allowed, it is ordered that the same shall operate as a supersedeas, and that the temporary restraining order be restored during the pendency of the appeal, the said appellant having executed a bond in the sum of $2700.00, as provided by law, and the clerk

is hereby directed to stay the mandate of the District Court of the United States, Southern District of Ohio, Eastern Division, until the further order of this court. Equity Rule No. 74.

BOND ON APPEAL.

Know all men by these presents, that J. P. Grubb, doing business interstate, as the Tri-State Transit Company, as principal and Independence Indemnity Company, as sureties, are held and firmly bound unto, the Public Utilities Commission of Ohio, and each member thereof, and The Cannonball Transportation Company, The Portsmouth Public Service Company, The Ohio Valley Electric Railway Company, The Interstate Motor Transit Company, The Ohio Valley Bus Company, in the sum of two thousand, seven hundred dollars ($2700.00), to be paid to said, the Public Utilities Commission of Ohio, and each member thereof, and The Cannonball Transportation Company, The Portsmouth Public Service Company, The Ohio Valley Electric Railway Company, The Interstate Motor Transit Company, and The Ohio Valley Bus Company, their successors and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this eleventh day of July, 1929.

Whereas, lately at a regular term of the District Court of the United States for the Southern District of Ohio, Eastern Division, in a suit depending in said court, be-

tween said J. P. Grubb, a natural person, etc., plaintiff v. the Public Utilities Commission of Ohio, et al., defendants, No. 627, in equity, on the docket of said court, a decree was rendered against the said plaintiff dismissing his bill of complaint and his amendment to the bill of complaint, and dissolving the temporary restraining order theretofore allowed, and the plaintiff having served upon the Public Utilities Commission of Ohio and its attorney of record, and on the attorneys of record of the defendants, and filing in the office of the clerk of this court, said clerk being the clerk of the court with whom the order appealed from is entered, a written notice that plaintiff herein appeals from the judgment, decree or order, said notice being in accordance with the act of congress, approved January 31, 1928, abolishing writs of error, and said plaintiff having filed his petition for an appeal and assignment of errors in the clerk's office of this court, and having obtained and filed an order allowing appeal, to reverse the judgment, order or decree in the aforesaid suit, and a citation directed to said defendants citing them to be and appear at a session of the Supreme Court of the United States, to be holden in the city of Washington, D. C.

Now, the condition of the above obligation is such, that if the plaintiff shall prosecute his appeal to effect, and answer all damages and costs, if he fail to make good his

plea, then this obligation shall be void, otherwise to remain in full force and effect.

Tri-State Transit Co.
D. B. A. Jas. P. Grubb
Jas. P. Grubb.
Independence Indemnity Co.
By William H. Dorn,
Attorney in Fact.

[Independence Indemnity Company Seal.]

Sealed and delivered in presence of:
John F. Carlisle
Enid Marshall.

The within bond is approved both as to sufficiency and form this twenty-ninth day of July, 1929.

Benson W. Hough,
United States District Judge, Southern District of Ohio, Eastern Division.

Receipt of a copy of the foregoing motion and parts of the record in support thereof acknowledged this ..... day of January, 1930.

....,
....,
....,
Attorneys for Appellant.

FILE COPY

Office Supreme Court,
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IN THE

Supreme Court of the United States

No. 627. 491

J. P. GRUBB, A NATURAL PERSON, ETC.,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, ET AL.,
Appellees.

BRIEF OF APPELLEES, ON MOTION TO DISMISS OR AFFIRM.

GILBERT BETTMAN,
Attorney General of the State of Ohio.
T. J. HERBERT,
Assistant Attorney General.
A. R. JOHNSON,
MILLER & SEARL,
D. H. ARMSTRONG,
BLAIR & BALL,
Attorneys for Appellees.

TOOTHAKER & RODENFELS, Law Printers, Columbus, Ohio.

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IN THE

Supreme Court of the United States

No. 627.

J. P. GRUBB, A NATURAL PERSON PROPOSING TO OPERATE INTERSTATE, THE TRI-STATE TRANSIT COMPANY,

Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, WILLIAM KLINGER, JAMES W. HUFFMAN AND FRANK MAULLAR, MEMBERS OF AND CONSTITUTING SAID THE PUBLIC UTILITIES COMMISSION OF OHIO, THE INTERSTATE MOTOR TRANSIT COMPANY, A CORPORATION, THE CANNONBALL TRANSPORTATION COMPANY, A CORPORATION, THE PORTSMOUTH PUBLIC SERVICE COMPANY, A CORPORATION, THE OHIO VALLEY BUS COMPANY, A CORPORATION, ELSA CANTER, SHERIFF, SCIOTO COUNTY, OHIO, —— SHEETS, CHIEF OF POLICE OF PORTSMOUTH, OHIO, AND THE SHERIFFS OF FRANKLIN COUNTY, PICKAWAY COUNTY, ROSS COUNTY, PIKE COUNTY AND LAWRENCE COUNTY, ALL OF SAID COUNTIES BEING IN THE STATE OF OHIO, AND THE CHIEFS OF POLICE AND MEMBERS OF THE POLICE DEPARTMENTS OF THE CITIES, TOWNS AND VILLAGES OF THE STATE OF OHIO, WHOSE NAMES ARE UNKNOWN TO THE PLAINTIFF AND TOO NUMEROUS TO MENTION,

Appellees.

BRIEF OF APPELLEES, ON MOTION TO DISMISS OR AFFIRM.

I.

STATEMENT.

(Note: The letter "R" followed by figures indicates the page of the motion to dismiss or affirm judgment and the part of the transcript of the record appended thereto.)

This motion is based on the fact that the court below found the matters complained of in the bill of complaint and amendment thereto of appellant had been fully adjudicated and determined by the Supreme Court of the state of Ohio in an action in said court between the parties hereto, and that such adjudication and determination constituted res judicata and an estoppel of appellant from further prosecuting his said bill of complaint and amendment thereto in the federal court. (Entry in court below, Record, 92.)

Appellant based his claim for relief in the court below on the allegation in his complaint that on January 23, 1928, he filed an application with the Public Utilities Commission of Ohio, for certificate of convenience and necessity under the laws of Ohio, to operate motor busses carrying passengers for hire in interstate commerce only, between the cities of Columbus, Ohio, and Huntington, West Virginia, over a route therein set forth as follows:

> "Leave Columbus, Ohio, * * * via U. S. Highway No. 23 * * * to the corporation line of Portsmouth, Ohio; **thence via Chillicothe street, to the Ohio-Kentucky line, crossing river, to South**

Portsmouth, Kentucky, returning to Portsmouth; thence final destination—Huntington, West Virginia, and reverse."

That on March 13, 1928, hearing was duly had by the Public Utilities Commission of Ohio, upon appellant's said application, and evidence taken. That the final and formal order of said Public Utilities Commission of Ohio in said matter was issued April 2, 1928, effective May 1, 1928, granting the application of the appellant to operate said interstate motor bus line from Columbus, Ohio, through Portsmouth, Ironton, Ohio, and Russell, Kentucky, to Huntington, West Virginia, but denying said application to operate said motor bus line by a "prohibiting order", reading as follows:

> "Ordered, that appellant be and hereby he is prohibited from incorporating within the regular route upon which he will be herein granted a certificate to operate within the state of Ohio, any movement which shall provide for the crossing and recrossing of the Ohio river at Portsmouth, Ohio." (R., 27.)

Thereafter on April 20, 1928, this action was brought in the court below to enjoin the Public Utilities Commission of Ohio and other appellees from prohibiting said Grubb from going across the Ohio river at Portsmouth, Ohio, and immediately returning or, in other words, from excluding the going across the bridge of the Ohio river at Portsmouth and immediately returning. The bill of complaint, and particularly the amendment to the bill, states what Grubb sought to do by this equity suit in the court below. It contains this averment:

> "This action is brought under the first paragraph of Section 24, as amended, of the Judicial Code of

the United States, for the purpose of preventing the enforcement of an order of the Public Utilities Commission of Ohio, prohibiting plaintiff as a common carrier, from operating motor busses for hire, in interstate commerce, **between Portsmouth, Ohio, and a place in the state of Kentucky across the bridge from said Portsmouth, Ohio, and known as South Portsmouth, Kentucky, and return, crossing and recrossing the bridge over the Ohio river, connecting the said states of Ohio and Kentucky** at said places, which said operation is a part of a route from Columbus, Ohio, through the states of Ohio, Kentucky and West Virginia, to Huntington, West Virginia, in the bill of complaint more particularly described; that the defendant, the Public Utilities Commission of Ohio is resident of Columbus, Franklin county, Ohio; that this action and suit is of a civil nature, and that the matter and amount in controversy exceeds, exclusive of interest and costs, the sum of value of three thousand dollars, involves a federal question, and arises under Article 1, Section 8, of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations, and among the several states and with the Indian tribes, and also arises under the Fourteenth Amendment to said Constitution of the United States providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (R., 24.)

Said appellant prayed for an injunction restraining appellees from interfering with him or his servants in said operation over that part of the route included in said "prohibiting order" of the Public Utilities Commission of Ohio above quoted. (R., 23.)

From the allegations in the complaint and amendment thereto it is plain and conclusive that the matters sought to be complained of by Grubb **were heard on evidence adduced thereon,** and the facts determined by the Public Utilities Commission of Ohio, and thereafter by error proceedings taken by said Grubb were heard and determined by the Supreme Court of Ohio.

It further appears from the complaint that on April 17, 1928, appellant herein filed with the Public Utilities Commission of Ohio, his application for a rehearing of so much of its former "order" **as prohibited appellant from incorporating in his regular route** upon which he was granted certificate to operate within the state of Ohio any movement **which would provide for crossing and re-crossing the Ohio river at Portsmouth, Ohio,** which said application the said Public Utilities Commission, **on April 17, 1928,** denied. (R., 14.) This application was filed under the following provisions of Section 543 of the General Code of the state of Ohio regulating and governing the appellee, the Public Utilities Commission:

> "After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bond holder or other party pecuniarily interested in the public utilities affected, may apply for a rehearing in respect to any matters determined in said action or proceeding and specified in the application for rehearing, and the commission may grant and hold such rehearing on said matters, if in its judgment sufficient reason therefor be made to appear." (R., 67.)

On the thirty-first day of May, 1928, appellant filed in the Supreme Court of Ohio, Cause Number 21184, his

petition in error, seeking to reverse that part of said finding and order of said Public Utilities Commission **refusing to permit him to cross and recross the bridge between Portsmouth, Ohio, and South Portsmouth, Kentucky, as set out in its "prohibiting order"** hereinbefore set forth; in which petition in error there appeared, among others, the following assignments of error:

> "1. The commission erred in overruling and denying the application for a rehearing.
>
> 2. Said part of the order is not sustained by the evidence.
>
> 3. Said part of the order is contrary to law.
>
> 4. Said part of the order denies plaintiff in error (appellant) the rights, privileges and immunities guaranteed him as a citizen of the United States under the Fourteenth Amendment of the Constitution of the United States.
>
> 5. That said part of the order is in direct violation of Article 8, Section 1 of the Constitution of the United States granting power to Congress to regulate commerce among the several states, and is a prohibition of, burden on, and an unlawful interference and restriction of interstate commerce.
>
> 6. • • •
>
> 7. That said part of the order is contrary to the decisions of the Supreme Court of the United States and of the United States District Court, Eastern District of Kentucky, in the case of Magnuson v. Kelly, Commissioner, decided December 2, 1927. • • •." (R., 57.)

Said Supreme Court of the state of Ohio, following a hearing before it on said petition in error, did, November 14, 1928, render its decision sustaining the order of Appellee, the Public Utilities Commission, in all the mat-

ters complained of in the petition in error of appellant, and in the record and proceedings of said appellee the Public Utilities Commission of Ohio, including the "prohibiting order" hereinbefore quoted, which decision and finding of the Supreme Court was not appealed from and stands unreversed and unmodified, and is in full force and effect. (R., 59, 64, 86, 92.) This said proceeding in error was filed in, heard and determined by, the Supreme Court of the state of Ohio under the provisions of Sections 544 and 545, General Code of Ohio, regulating and governing appellant and appellee, Public Utilities Commission, as follows:

> "Section 544. A final order made by the commission shall be reversed, vacated or modified, by the Supreme Court, on a petition in error, if upon consideration of the record, such court is of the opinion that such order was unlawful and unreasonable."
>
> "Section 545. The proceeding to obtain such reversal, vacation or modification, shall be by petition in error, filed in the Supreme Court by any party to the proceeding, before the commission, against the Public Utilities Commission of Ohio, setting forth the errors complained of." (R., 68, 69.)

II.

FINDING OF THE COURT BELOW.

By and under the proceedings before said Public Utilities Commission and by reason of Grubb's prosecuting error to the Supreme Court of Ohio by virtue of Sections 544 and 545 quoted above, and by reason of the bill of complaint and amendment thereto so filed by said Grubb, the court below found that,

"On January 23, 1928, Grubb filed application with the Public Utilities Commission of Ohio, for a certificate of convenience and necessity, describing in detail the route above mentioned, which application was heard by the commission on March 13, 1928. On April 2, 1928, the **application was granted** and allowed by the commission, **except the loop from Portsmouth, Ohio, across the river bridge to South Portsmouth, Ky., and return, which was by said order in effect disallowed.** Subsequently an application for a rehearing was filed, and on the seventeenth of April, 1928, this application was overruled.

"The plaintiff began this suit on the twentieth of April, 1928, and on May 31, 1928, **he filed in the Supreme Court of Ohio his petition in error, seeking to reverse the Public Utilities Commission in its refusal to permit him to cross and recross the bridge between Portsmouth and South Portsmouth** (544 G. C.). **Among other errors complained** of in the petition in error, the **plaintiff says** that the part of the order of the commission **refusing permission to cross and recross between the two municipalities** is contrary to law, and that it denies to him the rights, privileges and immunities guaranteed him as a citizen of the United States under the Fourteenth Amendment to the Constitution of the United States, and is in direct violation of Section 8, Article 1 of the Federal Constitution granting power to Congress to regulate commerce among the several states, and is a prohibition of, burden on, and an unlawful interference and restriction to, interstate commerce.

"The review to the Supreme Court of Ohio was argued and submitted to that court on October 3, 1928, and on November 14, 1928, the Supreme Court affirmed the Public Utilities Commission.

"**The defendants** in this case other than the Public Utilities Commission and except the public peace officers named as defendants, **filed their answers to the bill of complaint, denying** among other things **the unlawfulness and unconstitutionality of the action**

and final order of the commission, **wherein it failed and refused to include** in the certificate of convenience and necessity issued, **that part of the route applied for over the river bridge and between Portsmouth and South Portsmouth.** The case was heard by the court upon the pleadings, proof, and argument, and taken under advisement.

"Subsequently, and after the announcement of the decision of the Supreme Court of Ohio, the defendants asked and were granted leave to file their separate supplemental answers, and the defendant, Public Utilities Commission, upon leave granted, filed its original answer, all pleading the decision and judgment of the Supreme Court of the state upon review of the finding and order of the Public Utilities Commission.

"Later, a further hearing was had in the instant case, wherein evidence was offered and received, substantiating the allegations of the supplemental answers. There is then before this court, the transcript and record of the case that was before the Supreme Court, and upon which that court arrived at its judgment.

"**We are therefore confronted with the question as to whether the disposition of the case by the Supreme Court,** (Grubb, etc., and Interstate Motor Transit Co. v. Public Utilities of Ohio, 119 O. S., 264), **is a bar in this court,—that is to say, whether that court's judgment is res adjudicata or an estoppel in this court.** This question is entirely independent of the question of the jurisdiction of this court and one lately made by supplemental pleading and proof.

"It is urged by the plaintiff that after the final action of the Board of Public Utilities, he was entitled to choose his own forum. We may assume that he is correct in that view, but it seems that he has gone further and chosen more than one forum. He selected this court on April 20, when he filed his bill of complaint, and then chose the Supreme Court

of Ohio when he filed his petition in error on May 31. As to the later selection, his right to review is provided by Section 544, G. C., as follows: 'A final order made by the commission shall be reversed, vacated, or modified by the Supreme Court on a petition in error, if upon consideration of the record such court is of the opinion that such order was unlawful and unreasonable.'

"**The high court of the state neither reversed, vacated, or modified the final order of the commission —but instead affirmed it. This means that it found the acts of the commission lawful and reasonable.** Nor can it be said that the court did not have before it the question of the lawfulness of the order in view of the fact that the plaintiff's petition in error in his assignments of error **made the allegation both that the final order of the commission in eliminating the loop, was contrary to the law and contrary to the guarantees contained in the Federal Constitution, as mentioned above.** And, although that court in its opinion (119 O. S., 264) failed to deal with the illegality of the commission's action and findings in relation to the constitutional guarantees and limitations, yet the power and duty given it by the statute in such cases and the raising of that question by the plaintiff in his pleadings, results in the conclusion that the Supreme Court passed upon all questions that were before it, and its judgment must be interpreted to include a finding that the acts and orders of the commission were such as not to invade the constitutional rights of the plaintiff Grubb.

"The doctrine of estoppel by judgment or res adjudicata as a practical matter proceeds upon the principles that one person shall not a second time litigate with the same person, or with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controversy or issue, which has been necessarily tried and finally determined upon its merits by a court of competent jurisdiction in a judg-

ment in personum in a former suit. **U. S. v. California Bridge Co.**, 245 U. S., 337, 341; **Hopkins v. Lee**, 6 Wheat, 109, 113; **Southern Pacific Co. v. U. S.**, 168 U. S., 1, 48; **Biglow v. Old Dominion Cooper Mining Co.**, 225 U. S., 111, 127.

"As is said by the Federal Supreme Court in the case of **Postal Telegraph Cable Co. v. The City of Newport**, 247 U. S., 464, 476,—'The doctrine of res adjudicata rests at bottom on the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction.'

"Nor can a fact or right distinctly adjudged be disputed in a subsequent action between the same parties, even upon another demand, and although the original determination was reached upon an erroneous view or application of the law. **U. S. v. Moser**, 266 U. S., 236.

"The court of this district (Donahue, circuit judge, Sater and Hickenlooper, district judges, sitting) had before it the question of res adjudicata in the case of **Van Wert Gas Light Co. v. Public Utilities Commission**, 299 F., 670, wherein that court found that the doctrine of res adjudicata did not apply,—but on page 675 of its opinion, made the following pertinent observations: 'At the time of these error proceedings, however, there had been no confiscatory act, because the rate had not been fixed, and non constat, the commission would still fix a rate which would afford a reasonable return upon the larger value of plaintiff's property, and no federal question had theretofore arisen which would permit the issuance of a writ of error from the Supreme Court of the United States to the Supreme Court of Ohio. The question is therefore presented whether, even assuming the absence of the right to prosecute error, the complainant is nevertheless estopped by the judgment of the Supreme Court of Ohio to again litigate the question of valuation in

another court, either directly or as a part of a broader cause of action involving it. Had this matter of valuation been the subject of judicial review in the Supreme Court of Ohio, and such finding of the Public Utilities Commission on this question been affirmed, an estoppel by judgment would arise, which would preclude the re-examination of this question in any other tribunal, as between these same parties. Such judicial examination of the question would operate as an estoppel as to every issue and point controverted, upon the determination of which the judgment of the court was rendered.'

"The procedure provided by Section 544, G. C., and adopted by the plaintiff in bringing his case before the Supreme Court for reviewing, brought to that court a judicial issue to be tried by a judicial tribunal. **Hocking Valley Ry. Co. v. Public Utilities Commission,** 100 O. S., 321. In exercising revisory jurisdiction of the proceedings of the administrative board, that court by its own interpretation, exercised judicial functions.

"The Public Utilities Commission is a defendant in both cases; the other answering defendants in the instant case are competing transportation companies, who were protestants before the Public Utilities, and who thereafter filed proceedings in the Supreme Court to review the final order of the commission. This case was consolidated with the Grubb case in the Supreme Court, and decided under the same opinion of the court. (119 O. S., 264). Therefore, there is an identity of parties in the litigation in both courts, and as we have seen from the discussion above, there is also an identity of subject matter. Nor can there be any question concerning the jurisdiction of the Supreme Court or of this court. **The elements are all present to put in effect the doctrine of estoppel or res adjudicata.**

"The fact that the instant case was begun in this court prior to the institution of the proceedings in error in the Supreme Court will not preclude appli-

cation of the doctrine of estoppel. **Chicago, Rock Island & Pacific Ry. Co. v. Schendel, Admr.**, 270 U. S., 611. It is the fact that the proceeding in error in the Supreme Court developed into a final judgment while the case in this court was still pending, with all the necessary elements of the doctrine present, that constitutes the bar.

"The case is dismissed at the cost of the complainant." (R., 85 to 92.) (Boldface ours.)

III.

THE HEARING IN THE SUPREME COURT OF OHIO IS RES ADJUDICATA.

That the findings and judgment of the United States District Court below states the law clearly and concisely when applied to the actual facts in this case. Here the Supreme Court of Ohio had on October 3, 1928, had presented to them the identical questions by reason of Grubb's petition in error from the Public Utilities Commission, and said Supreme Court had on November 14, 1928, affirmed the holdings of said Public Utilities Commission, and the identical matters that were set up in this bill in equity in the court below were the identical matters passed upon and adjudicated by the Supreme Court of Ohio on November 14, 1928, this being prior to any adjudication of the matters in the court below, was and is a complete defense to this proceeding in the lower court as well as in this court, and this principal is so well established that we only cite a few decisions.

The first syllabus of **Kessler v. Eldred**, 206 U. S., 285, is as follows:

> "**Rights between litigants once established by the final judgment of a court of competent jurisdiction must be recognized in every way**, and wherever the judgment is entitled to respect, by those who are bound thereby."

And in the first syllabus of **Schuler v. Israel**, 120 U. S., 506, to wit:

> "A judgment recovered in one court may be pleaded as a defense to a suit on the same cause of action pending in another, when, by law, the cause of action is merged in the judgment."

In the case of **Kessler v. Eldred**, supra, as in the instant case, the defeated party instituted the action and procured the adjudication and judgment constituting the bar or estoppel. The law just quoted applies without regard as to which action was first instituted, and is stated in the first syllabus of **McDougal and Others v. Black Panther Oil, Etc.**, 273 Federal, 113, in the following language:

> "Where two actions between the same parties involving the same cause of action proceed at the same time in courts of concurrent jurisdiction, **it is not the final judgment in the action first brought, but the first final judgment**, although that may be in the action last brought, **that renders the issues res judicata in both actions.**"

And was applied by this court in the case of **Insurance Company v. Harris**, 97 U. S., 331.

IV.

THE CROSSING AND RECROSSING OF THE OHIO RIVER AT PORTSMOUTH CONTENDED FOR BY APPELLANT IS A SUBTERFUGE INTRASTATE TRANSPORTATION OF PERSONS AND THE PUBLIC UTILITIES COMMISSION OF OHIO SO FOUND AND THIS FINDING WAS AFFIRMED BY THE SUPREME COURT OF OHIO.

One of the questions decided by the Public Utilities Commission upon the evidence and record before it, and which was taken to the Supreme Court by Grubb, was whether or not the crossing and immediate re-crossing of the bridge across the Ohio river at Portsmouth was a subterfuge and evasion and not in fact interstate commerce. The Public Utilities Commission made this finding, to wit:

> "**That the said proposed divergence by the applicant in the city of Portsmouth, Ohio, to a point immediately outside of the state of Ohio, and the prompt return to Portsmouth is clearly for the purpose of creating another such subterfuge** and evading the statutory requirement of the procurement of a certificate to engage in intrastate motor transportation service within the state of Ohio, and
>
> "That the said J. P. Grubb proposing to do business as The Tri-State Transit Company is the same J. P. Grubb who was president of and also manager of said The Interstate Motor Transit Company when the same was declared by this commission to be a

subterfuge intrastate transportation operator, **and that the proposed crossing and recrossing of the Ohio-Kentucky state line** is at the same identical point where the said J. P. Grubb's company **was then crossing and recrossing,** and

"That this commission is of the opinion **that such proposed crossing and recrossing will serve only a subterfuge purpose** and that such can be prevented only by denying the right to so operate, and

"That, for such reason, said application, in so far as it asks the inclusion within the regular route to be operated upon by the said applicant **of the crossing and recrossing of the Ohio river at Portsmouth, Ohio, should be, and hereby it is denied.**

"It is therefore, ordered, that the **said applicant be, and** hereby he **is prohibited from incorporating within the regular route** upon which he will herein be granted a certificate to operate within the state of Ohio, **any movement which shall provide for the crossing and recrossing of the Ohio river at Portsmouth, Ohio."** (Boldface ours.)

The Public Utilities Commission of Ohio had the right to pass upon the above question. It was its duty. The commission has the exclusive right to reasonably control and regulate the use of its highways. The only limitation is that it does not directly burden or interfere with interstate commerce. **Interstate Busses Corporation v. Holyoke Street Railway Co.**, 273 U. S., 45.

Now was, and is, Grubb carrying on a legitimate interstate business in going across the Ohio river at Portsmouth, turning around and coming right back? Going to no station, going to no house or houses, and as conclusive evidence on this point, see picture Exhibit A as to the Kentucky end of this bridge. (R., 66.) It butts up

against an immense hill that human beings could scarcely climb. It reaches nowhere, it goes nowhere, it was simply a ruse to carry passengers from Columbus, Ohio, to Portsmouth, being absolutely intra-state business but going across the river and putting them off at the opposite end of the bridge at Portsmouth. And, on the return take any Portsmouth or other passengers from Ohio who would cross the bridge purposely to get Grubb's bus to Columbus, Ohio. It was simply a plain evasion of the facts as well as the law and it was not interstate commerce business. Please keep in mind that the regular route from Columbus, Ohio, to Huntington, West Virginia, did not and does not pass over this bridge over the Ohio river at Portsmouth; nor does this route connect up with or come near to said bridge. The route goes through Portsmouth, up the river on the Ohio side to Ironton, Ohio, a distance of approximately thirty miles, then crosses the Ohio river bridge from Ironton to Russell, Kentucky; thence over the Kentucky highway through Ashland, and Catlettsburg, Kentucky, across the Big Sandy river into West Virginia; thence to Huntington, West Virginia. There is no fact to call for any transportation across and recross the bridge at Portsmouth in this record from Columbus, Ohio, to Huntington, West Virginia. A similar case is found in **Inter-City Coach Co. v. Atwood, et al.**, 21 Fed. Rep. (2d Series), page 83. In the above cited case the busses crossed state lines and were claimed to be doing interstate business. The Rhode Island state authorities refused to recognize the business as interstate and the bus company brought action to enjoin the authorities in

Rhode Island from interfering with what the bus company claimed was sole and only interstate commerce transportation. The Court of Appeals held:

> "To constitute interstate commerce by a bus line, it is sufficient that its busses cross a state line, but they must transport passengers or goods interstate or be intended in good faith to do so."

Bus operator applied for a permit from the state of Rhode Island to operate between Woonsocket and Attleboro in Massachusetts, which was granted. It also applied for and was refused the permit to run busses between Providence, Rhode Island, and Attleboro, Massachusetts. It undertook to operate its busses between Woonsocket and Providence, Rhode Island, and to claim that it was transporting interstate passengers by having its route cross the Massachusetts line for a short distance. Judge Morton in delivering the opinion of the court at page 84, says:

> "The plaintiff insists that its motives in going into Massachusetts is immaterial, that the Rhode Island authorities must take its route as it is, and that if it actually crosses the state line, the plaintiff is ipso facto engaged in interstate commerce. We are not prepared to accede to this contention. **Interstate commerce is more than running a bus across the state line.**"

A little further on, he says:

> "The question before us, taking the evidence most favorable to the plaintiff, is whether a bus using the highways for carrying for hire intrastate passengers escapes state highway regulations because it may also carry an occasional interstate passenger. **In our opinion, it does not. Still less does it do so if**

the interstate connection of the transportation is a discredible subterfuge to which this court ought not to lend its countenance."

A little further on, he says:

"The interstate commerce does protect a real commerce. It has never been held and we believe never intended that a mere fiction of interstate commerce may be so availed so as to deprive a state of its power to enforce sound regulation of the use of its highways in intrastate commerce."

The language of Judge Morton is peculiarly applicable to the case at bar.

Under the operation sought to be protected by this action, plaintiff, if his prayer be granted, will be permitted by this subterfuge to unfairly compete with the defendant, The Cannon Ball Transportation Company, in the operation of its bus service between Portsmouth and Chillicothe, Ohio, and intervening points and between Portsmouth and Ironton, Ohio, and intervening points. Does the fact of these passengers going from Portsmouth to board plaintiff's busses at the south end of the bridge and their leaving the busses at that point and return to Portsmouth, constitute them interstate passengers? We submit that it does not.

When a certificate of convenience and necessity is issued to a person to operate busses he becomes a public agent. It is the policy of the st. te to protect this agent against unfair competition, bad faith and unfit and irresponsible persons.

V.

THE JUDGMENT OF THE SUPREME COURT OF OHIO IS RES ADJUDICATA NOT ONLY AS WHAT WAS DECIDED BUT OF WHAT MIGHT HAVE BEEN DECIDED.

It is apparent from this record so filed by appellant that there was brought before the Supreme Court of Ohio by reason of appellant's petition in error a review of all the facts as well as the law upon which appellant bases his action in the instant case. It is not necessary, however, that this record should disclose that all these facts and law were brought before the Supreme Court of Ohio. It is sufficient, and all that is necessary for this record to show is that the facts sought to be litigated herein by this appellant might have been put in issue, or were incidental to the issue that appellant in his proceedings before the Public Utilities Commission and in the Supreme Court of Ohio. In other words, the matters are adjudicated before the Public Utilities of Ohio and the Supreme Court, if the issue was raised or could have been raised therein. The law is correctly stated in the following cases:

The law applicable is stated in the fourth and fifth syllabi of **Sapulpa, Etc., Co. v. McCray**, 4th Federal Rep. (2d), 645), in the following language:

> "When a second suit is brought between the same parties on the same cause of action as the first, **the judgment in the former suit is conclusive** in the lat-

ter **as to every question and issue which** was, or **might have been presented and determined in the first suit.** .

"One who pleads, produces evidence, and submits to judgment or decree, on a part of an indivisible cause of action thereby estops himself from again maintaining an action on it or any part of it."

Certiorari denied. 269 U. S., 561.

And in **Bates v. Brodey**, 245 U. S., 520, by the court, in its opinion, at page 526, as follows:

"And this court has established a test of the things adjudged and the extent of its estoppel. It is: If the second action is upon the same claim or demand as that in which the judgment pleaded was rendered, **the judgment is an absolute bar not only of what was decided but of what might have been decided.**"

To the same effect is **Harrison v. Remington Paper Co.**, 140 Fed., 385, see p. 400; **Pierce v. National Bank of Commerce**, 268 Fed., 487, see p. 495; **Rishel v. McPherson**, 34 Fed. (2d), 250; the opinion of the court below in the instant case, 33 Fed. (2d), 323; **Southern Railroad Co. v. Blue Ridge Power Co.**, 30 Fed. (2d), 33; **Davis v. Mabee**, 32 Fed. (2d), 502; **Winship v. Ricketts**, 32 Fed. (2d), 476.

VI.

APPELLANT BY PROCURING THE JUDGMENT IN THE SUPREME COURT OF OHIO WAIVED HIS RIGHT TO APPEAL TO THE COURT BELOW FOR RELIEF.

Grubb, by filing his application before the Public Utilities Commission, making his application for rehearing before said commission and by prosecuting error to the Supreme Court of Ohio, wherein those proceedings involved the same facts and between the same parties as the instant case, thereby waived his right, if any he had, to prosecute any other action in any other court out of or connected with the facts so presented.

Judge Simonton, in the case of **Bailey v. Willeford,** 126 Fed., 803, in a somewhat similar case, uses the following language, at page 806:

> "The complainant is too late in seeking the aid of this court from supposed injuries in the state court. He could have removed his case at its inception into this court because of diversity of citizenship. If he had any reason to fear prejudice or local influence, he could remove it into this court at any time before trial. **He deliberately selected his tribunal. He made all his defenses in it. He took every chance for a successful result. Having experimented in the state court he cannot repeat his experiment here.**"

And cites the case of **Forsythe v. Hammond,** 166 U. S., 506.

The case of **Hyatt v. Challie**, 55 Fed., 267, is also in point, the syllabus of which is as follows:

> "An action of ejectment was brought in a state court, and, the trial having resulted in a judgment for the defendant, the plaintiff moved, pursuant to Gen. St. Kan. 4702, for a second trial as of right. The judgment was vacated and a new trial ordered. The cause was continued until the next term, and, when it was then called for trial, plaintiff dismissed the action. Thereafter, he commenced a similar action in Federal Court. Held, that electing to litigate his rights in the state court, having had one trial therein, and having demanded a new trial, and procured judgment against him to be set aside without cause under the statute, plaintiff had thereby waived his right to bring suit in the Federal Court, and that the action must be dismissed."

District Judge Riner, in delivering the opinion of the court, at page 268, quotes from **Frazier v. Weller**, 6th McLean, 12, the following:

> **"It would be a fraud upon the law. * * * He cannot claim the remedy in part to his advantage and then abandon it to the injury of the other party."**

With equal force may it be said that Grubb cannot prosecute his action in the Supreme Court of the state of Ohio, and then abandon the force of the judgment rendered therein. To the decision, judgment and order of the Supreme Court of the state of Ohio appellant, J. P. Grubb, has had a complete remedy if the same is erroneous,—to have applied to this court for a review thereof under the following provisions of Section 237 of an act entitled "an act to amend the Judiciary Code, etc., passed by Congress February 13, 1925":

> "Section 237. (a) A final judgment or decree in any suit in the highest court of a state in which a

decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Cort upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such state court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.

"(b) It shall be competent for the Supreme Court, by certiorari to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ or error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the federal claim is sustained as where it is denied."

VII.

APPELLANT BY ALLOWING THE DECISION OF THE SUPREME COURT OF OHIO TO STAND UNCHALLENGED IS PRECLUDED FROM BRINGING AND PROSECUTING THIS ACTION.

So long as Grubb allows and permits the decision and judgment of the Supreme Court of Ohio to stand unchallenged and no proceedings to vacate or set it aside, and that judgment is in full force and effect, as it is today, it is a complete bar to this action which Grubb sought to bring in the U. S. District Court and which is appealed to this Honorable Court.

In **Fernal v. Glenn**, 56 Fed., Rep., 372, Judge Townsend in delivering the opinion at page 373 says:

> "**It appears to be established** by the decisions of the Supreme Court of the United States and other authorities, that **one court should not interfere with the operation of a judgment or decree of another court, because procured by fraud or collusion, if the complainant** either still has an opportunity to obtain relief by revealing the facts in the latter suit in the suit before him, or **has lost such opportunity by his own negligence.**"

In **Bauer v. Stein**, 177 Fed. Rep., 373, Judge Gilbert, at page 677, in delivering the opinion, says:

> "**A party who thus neglects to avail himself of the remedies afforded in the state court, is precluded from resorting to a Federal Court to obtain relief against the decree.**"

In the case of **Pickford v. Talbott**, 225 U. S., 651, Judge Pitney, in delivering the opinion of the court, at page 658, says:

> "As Chief Justice Marshall said: 'Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or neglect in himself or his agents, will justify an application to a court of chancery.' Marine Ins. Co. v. Hodgson, 7 Cranch, 332, 336. Or, as Mr. Justice Curtis expressed it in Hendrickson v. Hinckley, 17 Hoy., 443, 445: **'A court of equity does not interfere with judgments at law, unless the complainant** has an equitable defense of which he could not avail himself at law because it did not amount to a legal defense or **had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with neglect of himself or his agents.'** "

See case of **Phillips v. Negley**, 117 U. S., 665, at page 675.

VIII.

APPELLANT HAD A FULL, COMPETE AND ADEQUATE REMEDY AT LAW AND IS THEREBY PRECLUDED FROM INVOKING THE AID OF A COURT OF EQUITY.

Grubb had, and has, a plain statutory remedy, **in case the Public Utilities Commission was wrong in not allowing him to go across the Portsmouth bridge to the end, turning around and coming back,** and calling it interstate commerce. He applied for a rehearing under Ohio Code, Section 543. This was refused by the Public Utilities Commission. The Supreme Court of Ohio had exclusive control, Ohio Code 544.

> "Final order made by the commission shall be reversed, vacated, or modified by the Supreme Court, on a petition in error, if upon consideration of the record such court is of the opinion that such order was unlawful and unreasonable."

Grubb filed his petition in error under Ohio Section 545 wherein it is provided:

> "The proceeding to obtain such reversal, vacation, or modification, shall be by petition in error filed in the Supreme Court by any party to the proceeding before the commission against the Public Utilities Commission setting forth the errors complained upon, etc."

Then it is expressly provided in Ohio Code, Section 549:

> "No court other than the Supreme Court shall have power to review, suspend, or delay any order made by the commission, or enjoin, restrain, or interfere with the commission, or any member thereof in the performance of his official duties, nor shall the writ of mandamus be issued against the commission or any member thereof by any court other than the Supreme Court."

This cause was pending in and adjudicated by the Supreme Court of Ohio, and is res adjudicata—a bar to appellant's further prosecution of Ohio action. If appellant failed to take all the necessary steps as provided by said Section 237 U. S. Statute hereinbefore set out in order to have said judgment of the Supreme Court of Ohio reviewed by this court, he can not now come into this court for relief.

Gorham Mfg. Co. v. State Commissioners of N. Y., 266 U. S., 265-269.

> "A taxpayer who does not exhaust the remedy provided before an administrative board to secure the correct assessment of a tax cannot thereafter be heard by a jurisdictional tribunal to assert its invalidity."

Farcomb v. County of Denver, 252 U. S., page 7. And we quote from pages 11 and 12:

> "Plaintiff in error did not avail themselves of the privilege of a hearing as provided by this section, but after the assessing ordinance had been passed, began this proceeding in the district court to test the constitutionality of the law. As we have said, the question as to what should be a proper construction of the charter provision was not for our de-

cision; that matter was without the sole authority of the state court, and was disposed of, as the Supreme Court of Colorado held, by the former cases reported."

Milheim et al. v. Moffat Tunnel Improvement District, 262 U. S., p. 710.

In that case the property owners had failed to appear and protest before the tax commission, and the court held that a property owner,

"who fails to appear before a tax commission to object to a tentative ad valorem basis for assessment for public improvements cannot complain before the court of the adoption of such basis on the ground of its unconstitutionality."

McGregor v. Hogan, 263 U. S., p. 234:

"Having thus failed to avail himself of the hearing granted by the act, he was properly held by the Supreme Court of Georgia to have no just ground of complaint. Where a city charter gives property owners an opportunity to be heard before a board of assessors with respect to the justice and validity of local assessments for proposed public improvements, and empowers the board to determine such complaints before the assessments are made, **parties who do not avail themselves of such opportunity cannot thereafter be heard to complain of such assessment as unconstitutional.**"

It appears from the printed record attached to the motion in this case that appellant not only could, but did, obtain an adjudication of the facts in issue in this case by a proceeding in error from the determination of the matter by the appellee. Public Utilities Commission of Ohio, to the Supreme Court of the state of Ohio, (R)

from which court he was entitled to have the matter brought to this court for review. (Sec. 237, U. S. Judicial Code hereinbefore set forth.) Appellant ..... thus had a complete, practical and adequate remedy at law, and the law applicable thereto is stated in the first of **Boise Water Company v. Boise City**, 213 U. S., 276, in the following language:

> **"Equity will not interpose where there is a remedy at law which is as complete, practicable and adequate, as equity could afford."**

Judge Moody, in delivering the opinion of this court, in that case, at page 281, says:

> **"It is a guiding rule in equity that in such a case it will not interpose where there is a plain, adequate and complete remedy at law.** This rule was, at an early date, crystallized into statute form by the six teenth section of the judiciary act (revised Statutes Para. 723), which, if it has no other effect, emphasizes the rule and presses it on the attention of courts.
>
> **N. Y. & C. Co. v. Manchester Water Co.**, 107 U. S., 205, 214."

IX.

THIS ACTION IS PROSECUTED FOR DELAY ONLY.

We submit that it is manifest from the record that the institution of this action as well as the appeal and supersedes herein by the appellant has been for the sole purpose of enabling appellant to violate the order of the Public Utilities Commission of Ohio, and to delay its enforcement.

Grubb has been continuously and still is operating over this prohibited route, being enabled to do by reason of the executing of the small bond herein. His operation is openly and flagrantly in the teeth of the Public Utility Commission's holding of the state of Ohio, and in the teeth of the ruling and judgment of the Supreme Court of the state of Ohio. Necessarily, this has been of great damage to the legitimate, certified bus public utility, to wit, Cannon Ball Transportation Company that operates over this route as an intra-state carrier from Chillicothe, Ohio, to Ironton, Ohio. And there being no merit in the appellant's contention, the motion filed herein by appellees should be sustained.

X.

THIS MOTION CONFORMS TO THE PRACTICE IN THIS COURT.

This motion has been prepared under the ruling of this honorable court in the case of **Hart Steel Company v. Railroad Supply Company**, 244 U. S., 294.

Respectfully submitted,

GILBERT BETTMAN,
Attorney General of the State of Ohio.
T. J. HERBERT,
Assistant Attorney General.
A. R. JOHNSON,
MILLER & SEARL,
D. H. ARMSTRONG,
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 491

J. P. GRUBB, A NATURAL PERSON, ETC.,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, ET AL.,
Appellees.

REPLY BRIEF OF APPELLEES, ON MOTION TO DISMISS OR AFFIRM

GILBERT BETTMAN,
Attorney General of the State of Ohio.
T. J. HERBERT,
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THE KAH-PATTERSON CO., PRINTERS, PORTSMOUTH, O.

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SUBJECT INDEX

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The crossing and recrossing of the Ohio River at Portsmouth, contended for by appellant is a subterfuge intra-state transportation of persons and the Public Utilities Commission of Ohio so found, and this finding was affirmed by the Supreme Court of Ohio (Par. 4, page 15 former brief of Appellees).----------2-3

Our system of government rests upon the lawful right of the citizen whether arising from the legitimate exercise of state or national power unless excepted by express constitutional or valid legislative limitation to resort to either the courts of the state or nation for redress of their grievances.----------2-5

Neither the constitution of the U. S. or the laws enacted by Congress confer exclusive jurisdiction on the federal courts in the instant case, consequently the Federal Court does not have exclusive but concurrent jurisdiction with the Courts of Ohio herein.------2-7

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IN THE

Supreme Court of the United States

No. 491

J. P. GRUBB, A NATURAL PERSON PROPOSING TO OPERATE INTERSTATE, THE TRI-STATE TRANSIT COMPANY,

Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, WILLIAM KLINGER, JAMES W. HUFFMAN AND FRANK MAULLAR, MEMBERS OF AND CONSTITUTING SAID THE PUBLIC UTILITIES COMMISSION OF OHIO, THE INTERSTATE MOTOR TRANSIT COMPANY, A CORPORATION, THE CANNONBALL TRANSPORTATION COMPANY, A CORPORATION, THE PORTSMOUTH PUBLIC SERVICE COMPANY, A CORPORATION, THE OHIO VALLEY BUS COMPANY, A CORPORATION, ELSA CANTER, SHERIFF, SCIOTO COUNTY, OHIO, — SHEETS, CHIEF OF POLICE OF PORTSMOUTH, OHIO, AND THE SHERIFFS OF FRANKLIN COUNTY, PICKAWAY COUNTY, ROSS COUNTY, PIKE COUNTY AND LAWRENCE COUNTY, ALL OF SAID COUNTIES BEING IN THE STATE OF OHIO, AND THE CHIEFS OF POLICE AND MEMBERS OF THE POLICE DEPARTMENTS OF THE CITIES, TOWNS AND VILLAGES OF THE STATE OF OHIO, WHOSE NAMES ARE UNKNOWN TO THE PLAINTIFF AND TOO NUMEROUS TO MENTION,

Appellees.

REPLY BRIEF OF APPELLEES ON MOTION TO DISMISS OR AFFIRM.

FIRST

STATEMENT

On page 54 of Appellants Brief, we find the following head:

"THE JURISDICTION OF THE FEDERAL COURT IS EXCLUSIVE"

The entire argument of his brief is based on this proposition,—neither the cases cited by appellant nor the reason given in his brief support this claim, and it is untenable for the following reasons:

1. The crossing and recrossing of the Ohio River at Portsmouth, contended for by appellant is a subterfuge intra-state transportation of persons and the Public Utilities Commission of Ohio so found, and this finding was affirmed by the Supreme Court of Ohio (Par. 4, page 15 former brief of Appellees).
2. Our system of government rests upon the lawful right of the citizen whether arising from the legitimate exercise of state or national power unless excepted by express constitutional or valid legislative limitation to resort to either the courts of the state or nation for redress of their grievances.
3. Neither the constitution of the U. S. or the laws enacted by Congress confer exclusive jurisdiction on the federal courts in the instant case, consequently the Federal Court

does not have exclusive but concurrent jurisdiction with the Courts of Ohio herein.

We will notice the foregoing propositions in their order:

1. **THE CROSSING AND RECROSSING OF THE OHIO RIVER AT PORTSMOUTH, CONTENDED FOR BY APPELLANT IS A SUBTERFUGE INTRA-STATE TRANSPORTATION OF PERSONS AND THE PUBLIC UTILITIES COMMISSION OF OHIO SO FOUND, AND THIS FINDING WAS AFFIRMED BY THE SUPREME COURT OF OHIO (Par. 4, page 15, former brief).**

This proposition appears on pages 15 to 19 inclusive of its original printed brief filed herein, where it clearly appears from the record that the facts upon which appellant bases his contention that the crossing and recrossing of the bridge over the Ohio River at Portsmouth, constitutes interstate commerce, was in issue, heard on the evidence, and determined by both the Public Utilities Commission of Ohio and the Supreme Court of Ohio. This is not a question of interstate commerce, because the commission, in the legitimate exercise of its powers found that the crossing of the bridge over the Ohio River at Portsmouth, and return, was a subterfuge to evade compliance with the statutory requirement of Ohio. Appellant cannot avoid the laws of the State of Ohio, and do intra-state business under the cloak and guise of simply crossing the bridge at Portsmouth from Ohio to Kentucky and immediately returning.

The independent right of the State of Ohio to pro-

tect its highways, prescribe their use and determine the facts in respect thereto is exclusive. Appellant, Grubb, in this case should not be permitted to defeat this right of the State of Ohio, by invoking the shadow of the interstate clause of the constitution of the United States without regard to its substance. This question is not new to this Court.

In the case of Kane vs. State of New Jersey, 242, United States, 160, the law applicable hereto, is stated in the fourth syllabus, in the following language:

> "The power of the state, in the absence of national legislation upon the subject, to regulate the use of its highways, by motor vehicles moving in inter-state commerce, applies as well to such as are moving through the state, as to such as are moving into it only."

We find this court, in delivering its opinion, at page 167, uses the following language:

> **"THE POWER OF A STATE TO REGULATE THE USE OF MOTOR VEHICLES ON ITS HIGHWAYS HAS BEEN RECENTLY CONSIDERED BY THIS COURT AND BROADLY SUSTAINED."**

The same question has been, before, considered and determined, by the Supreme Court, the highest court in the State of Ohio, in the case of Detroit-Cincinnati Coach Line, Inc., vs. Public Utilities Commission of Ohio, decided December 12th, 1928, 119 O. S., 324, in which the law is stated in the syllabus as follows:

> "Where a common carrier by motor vehicle operating over state highways in interstate com-

merce habitually violates reasonable and lawful rules and regulations of the public utilities commission of the state, carries passengers in intrastate service without a certificate authorizing the same and violates the laws of the State regulating the speed of motor vehicles on the state highways, all such violations being committed in such manner and to such extent as would justify a revocation of the certificate of an operator of motor vehicles in intrastate commerce, the certificate theretofore granted to such operator by the public utilities commission to operate as a common carrier in interstate commerce may be revoked."

It appears from the foregoing citations that broad judicial sanction has been given to the right of the State of Ohio, to regulate the use of its highways by motor vehicles moving in inter-state commerce by the highest courts, both state and federal, to-with: The Supreme Court of the State of Ohio, and this Court.

2. OUR SYSTEM OF GOVERNMENT RESTS UPON THE LAWFUL RIGHT OF THE CITIZEN WHETHER ARISING FROM THE LEGITIMATE EXERCISE OF STATE OR NATIONAL POWER, UNLESS EXCEPTED BY EXPRESS CONSTITUTIONAL OR VALID LEGISLATIVE LIMITATION, TO RESORT TO EITHER THE COURTS OF THE STATE OR NATION FOR REDRESS OF THEIR GRIEVANCES.

This Court, in determining this question, in the case of Plaquemines Tropical Fruit Company vs. Hen-

derson, 170, United States 511, the court states the law in the following language:

> "The courts of a state may take cognizance of a suit brought by the State, in its own courts, against citizens of other states, subject to the right of the defendant to have such suit removed to the proper Circuit Court of the United States, whenever the removal thereof is authorized by act of Congress, and subject also to the authority of this Court to review the final judgment of the state court, if the case be one within its appellate jurisdiction.

Minneapolis & St. Louis Railroad Company vs Bombolis Administrator of Nanos, 241, United States 211, Chief Justice White, in delivering the opinion of the court at page 221, uses the following language.

> "Moreover the proposition is in conflict with an essential principal upon which our dual constitutional system of government rests, that is, that lawful rights of the citizens, whether arising from a legitimate exercise of state or national power, unless excepted by express constitutional limitation, or by valid legislation to the effect, **are concurrently subject to be enforced in the courts of the state or nation** when such right comes within the general scope of the jurisdiction conferred upon such courts by the authority, state or nation, creating them."

Galveston, Harrisburg & San Antonio Railway V. Wallace. Same vs. Crow. 223 United States 481 announces the law in the fourth syllabus, in the follow-

ing language:

> "When a federal statute, creating an action, such as the Carmack amendment, is silent on the subject of jurisdiction, the presumption is that the action may be asserted in a state, as well as in a federal court."

From the foregoing citiations it appears that the Public Utilities Commission and the Supreme Court, the highest court of the State of Ohio, had jurisdiction in the determination of the matters complained of in the Bill of Complaint of appellant. The fact that appellant instituted the proceedings in error in the Supreme Court of the State of Ohio to reverse the finding of the Public Utilities Commission of Ohio in said matter making only the State of Ohio defendant in error cannot avail appellant herein. The other appellees herein were bound by whatever judgment the Supreme Court of Ohio might render in said proceedings. They were mere privies to the Public Utilities Commission of Ohio as defendant in error. But from the records in the case it affirmatively appears appellees as a matter of fact were by the joining of the hearing of the two proceedings in error represented before the Supreme Court in the determination of the matter.

From these considerations, it is apparent that the jurisdiction of the Supreme Court of Ohio, is concurrent with that of the Federal Courts unless such jurisdiction is exclusively conferred by the provisions of the constitution or the laws of the United States, hence we will notice the third proposition.

3. NEITHER THE CONSTITUTION OF THE UNITED STATES OR THE LAWS ENACTED BY

CONGRESS CONFER EXCLUSIVE JURISDICTION ON THE FEDERAL COURTS IN THE INSTANT CASE, CONSEQUENTLY THE FEDERAL COURT DOES NOT HAVE EXCLUSIVE BUT CONCURRENT JURISDICTION WITH THE COURTS OF OHIO HEREIN.

The jurisdiction of Federal Courts is provided by the following provisions of Section 2, Article 3 of the Constitution of the United States.

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and martime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; beween citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citiens thereof, and foreign States, citizens thereof, and foreign States, citizens, or subjects.
>
> In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact,

with such exceptions and under such regulations as the Congress shall make."

The law enacted by Congress governing jurisdiction, is contained in Section 1233 (Section 256 of the Judicial Code) in the following language:

> Cases in which jurisdiction of United States Courts shall be exclusive of State Courts.
>
> The jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states:
>
> First: Of all crimes and offenses, cognizable under the authority of United States.
>
> Second: Of all suits for penalties and forfeitures incurred under the laws of the United States.
>
> Third: Of all civil causes of admiralty and maritime jurisdiction; serving its suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.
>
> Fourth: Of all seizures under the laws of the United States on land or on waters, not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

Fifth: Of all case arising under the patent-right, or copy-right laws of the United States.

Sixth: Of all matters and proceedings in bankruptcy.

Seventh: Of all controversies of a civil nature, where a state is a party, except between a state and its citizens, or between a state and citzen of other states, or aliens.

Eighth: Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls.

R. S. Par. 711 Act March 3, 1911. c 231, Par. 256, 36 Stat. 1160.

It will thus be seen that exclusive jurisdiction in the matter in the instant case is not conferred upon the Federal Courts, either by the provisions of the constitution or the laws of the United States, and therefore the jurisdiction of the Supreme Court, the highest court in the State of Ohio, is concurrent with the Federal Courts, to determine said matter. Appellant Grubb had his remedy under the provisions of Section 237 of an act entitled:

> "An act to amend the judiciary code, etc., passed by Congress February 13th, 1925."

which act is set out in full, pages 23 and 24 of our former brief, to have prosecuted error to this court from

the judgment of the Supreme Court of Ohio, and having failed and neglected to do so, he has waived his right to appeal to the Court below in the instant case, and the Motion should be sustained.

Respectfully sbuitted,

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SUPREME COURT OF THE UNITED STATES.

No. 491.—October Term, 1929.

J. P. Grubb, Appellant, *vs.* The Public Utilities Commission of Ohio, et al.	On Appeal from the District Court of the United States for the Southern District of Ohio.

[May 19, 1930.]

Mr. Justice Van Devanter delivered the opinion of the Court.

The appellant applied to the Public Utilities Commission of Ohio for a certificate to operate, solely in interstate commerce, a line of passenger motor busses over certain public highways in that State as part of an intended route between Columbus, Ohio, and Huntington, West Virginia. In his application he described the route as including a short loop at Portsmouth, Ohio, whereby the busses on reaching that point would cross the Ohio River to a village at the Kentucky end of the interstate bridge and then recross to Portsmouth before proceeding towards their destination. Several carriers likely to be affected if the application was granted intervened and filed protests. A hearing was had, after which the Commission made an order granting the requested certificate, but excluding the loop at Portsmouth from the intended route—the exclusion being put in the form of an express prohibition,[1] and the commission explaining that in its opinion the loop was intended to be merely a device to enable the appellant to carry passengers between Portsmouth and other points in Ohio and, by giving that service the appearance of an interstate service, to avoid compliance with the laws of that State relating to intrastate motor transportation. A rehearing was sought by the appellant because the loop

[1] "Ordered that the said applicant be, and hereby he is, prohibited from incorporating within the regular route, upon which he will herein be granted a certificate to operate within the State of Ohio, any movement which shall provide for the crossing and recrossing of the Ohio River at Portsmouth, Ohio."

at Portsmouth was excluded, and by the protestants because the certificate was granted; but the Commission adhered to its order.

The appellant then brought a suit in equity against the Commission in the District Court of the United States for the Southern District of Ohio to restrain and prevent the enforcement of so much of the order as excluded from the intended route the loop at Portsmouth. The protestants and some police officers who might be called on to assist in enforcing the order were made co-defendants with the Commission. The parties were all citizens of Ohio, and the sole ground advanced for invoking the jurisdiction of the federal court was that the suit was one arising under the Constitution of the United States and involving more than three thousand dollars. See sections 41 (1) and 380, Title 28, U. S. C.

In the bill so much of the order as excluded the loop at Portsmouth was assailed as an attempted restriction and regulation of interstate commerce by a state agency contrary to the commerce clause of the Constitution of the United States and to section 614-101 of the General Code of Ohio, and as denying to the appellant rights, privileges and immunities guaranteed by the Fourteenth Amendment. The prayer was for both an interlocutory and a permanent injunction, to be granted conformably to section 380, Title 28, U. S. C.

Three judges were called pursuant to that section to act in the suit; an interlocutory injunction was granted; and upon the final hearing there was a decree dissolving the injunction and dismissing the bill upon the ground that in a litigation between the same parties, had in the Supreme Court of Ohio while the suit in the District Court was pending, the Commission's order had been adjudged valid, and that the appellant was barred and estopped by that adjudication from further litigating the same matter. 33 F. (2d) 323. After the decree was entered, the appellant sought and the District Court allowed a direct appeal to this Court under sections 345 and 380, Title 28, U. S. C.

The appellees now have interposed a motion, under section 4 of rule 7 of the Rules of this Court, that the decree be affirmed without awaiting oral argument upon the ground that the objections taken to the decree are so unsubstantial as not to admit of debate; and the parties have submitted full briefs in this connection.

The laws of Ohio make provision for a review of final orders of the Commission by the Supreme Court of the State—a judicial

review culminating in a judgment. Gen. Code, §§ 544, 545; *Hocking Valley Ry. Co.* v. *Public Utilities Commission*, 92 O. St. 9, 14; *Hocking Valley Ry. Co.* v. *Public Utilities Commission*, 100 O. St. 321, 323; *Ohio Utilities Co.* v. *Public Utilities Commission*, 267 U. S. 359.

Shortly after the Commission denied their respective applications for a rehearing the appellant and the protestants by two distinct petitions sought and obtained a review of the Commission's order by the Supreme Court of the State—the appellant complaining of the exclusion of the loop at Portsmouth, and the protestants of the granting of the certificate. The Commission was made a party defendant to both petitions, and the petitions were consolidated and heard together. Thus the court had before it the entire order, the Commission, the appellant and the protestants. In that court the appellant charged in his petition that so much of the order as excluded the loop from the intended route was unlawful and should be reversed upon the grounds, among others, that it was not sustained by the evidence, denied to the appellant rights, privileges and immunities guaranteed by the Fourteenth Amendment, was in conflict with the commerce clause of the Constitution of the United States, and was in violation of section 614-101 of the General Code of Ohio. The grounds on which the protestants challenged the order are only obscurely indicated in the present record—possibly because having no bearing here.

After a hearing in which all of the parties participated the state court rendered a judgment sustaining and affirming the Commission's order in its entirety. 119 O. S. 264. No effort was made to have that judgment reviewed by this Court, and after the three months allotted for applying for such a review had elapsed, the defendants in the suit in the District Court, by leave of that court, interposed answers setting up the judgment as a bar to the further prosecution of the suit. A hearing upon this plea resulted in the decree now under review, which sustained the plea and dismissed the bill.

The case in the state court was so far identical with the suit in the federal court as respects subject matter and parties that there can be no doubt that the judgment in the former, unless invalidated by some jurisdictional infirmity, operated to bar the further prosecution of the latter. That the state court had jurisdiction of the

parties is plain and not questioned. But the appellant does question that it had jurisdiction of the subject matter—and this although at the outset he treated that jurisdiction as subsisting and invoked its exercise. Of course, he is entitled to raise this question notwithstanding his prior inconsistent attitude, for jurisdiction of the subject matter must arise by law and not by mere consent. We turn therefore to the grounds on which that jurisdiction is questioned.

The appellant relies on the commerce clause of the Constitution as in some way operating to commit to the federal courts and to withhold from the state courts jurisdiction of all suits relating to the regulation or attempted regulation of interstate commerce. This view of that clause is quite inadmissible. It has no support in any quarter, is at variance with the actual practice in this class of litigation, *Gibbons* v. *Ogden*, 9 Wheat. 1; *Western Union Telegraph Co.* v. *Public Service Commission*, 247 U. S. 105; *Pennsylvania Gas Co.* v. *Public Service Commission*, 225 N. Y. 397; s. c. 252 U. S. 23; *Peoples Gas Co.* v. *Public Service Commission*, 270 U. S. 550; *Public Utilities Commission* v. *Attleboro Co.*, 273 U. S. 83; *Murray* v. *Chicago & Northwestern Ry. Co.*, 62 Fed. 24, 42-43; and is in conflict with the doctrine often sustained by this Court that the state and federal courts have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States, save in exceptional instances where the jurisdiction has been restricted by Congress to the federal courts. *Claflin* v. *Houseman*, 93 U. S. 130, 136-137; *Robb* v. *Connolly*, 111 U. S. 624, 635-637; *Second Employers' Liability Cases*, 223 U. S. 1, 56-57; *Minneapolis & St. Louis R. R. Co.* v. *Bombolis*, 241 U. S. 211, 221-223. There is no such restriction which is applicable here.

It next is said that the suit in the federal court was begun before resort was had to the state court, and therefore that the jurisdiction of the federal court was exclusive and precluded action in the state court. In this the appellant is invoking a rule which is applicable to suits dealing with specific property and involving actual or potential control over the same, where necessarily the court (whether federal or state) first obtaining jurisdiction of the *res* must hold it to the exclusion of another. Here the litigation was not of that class, but was of such a nature that it could proceed in both courts, in virtue of their concurrent jurisdiction, until there

was a final judgment in one, *Kline* v. *Burke Construction Co.*, 260 U. S. 226, when that judgment would become conclusive in the other as *res judicata*. *Chicago, Rock Island & Pacific Ry. Co.* v. *Schendel*, 270 U. S. 611, 616; *Mutual Life Insurance Co.* v. *Harris*, 97 U. S. 331, 336.

By way of further questioning the state court's jurisdiction, it is said that the state statutes, rightly understood, do not invest that court with power to review orders of the Commission relating to interstate commerce, but only such as relate to other subjects, sections 502, 614-89, 614-101 of the Ohio General Code being cited. And by way of questioning that court's power to render the judgment in question, it is said that the state statute, section 544, General Code, although distinctly empowering the court to reverse, vacate or modify orders of the Commission found unlawful or unreasonable, contains no provision for an affirmance of those not so found. The powers of the state court in these particulars are questions of local law only. That court resolved them against the present contentions, for it both reviewed and affirmed the order. And that resolution is in accord with its earlier and later rulings. *Cannon Ball Transportation Co.* v. *Public Utilities Commission*, 113 O. S. 565; *Detroit-Cincinnati Coach Line, Inc.* v. *Public Utilities Commission*, 119 O. S. 324; *Wheeling Traction Co.* v. *Public Utilities Commission*, 119 O. S. 481. Plainly its solution of these questions of local law must be accepted as controlling in this Court, as they were in the District Court. *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 281; *Gasquet* v. *Lapeyre*, 242 U. S. 367, 369; *Iowa Central Ry. Co.* v. *Iowa*, 160 U. S. 389, 393.

In the opinion of the state court there is no express mention of the constitutional grounds on which the appellant asked a reversal of the order excluding the loop over the Ohio River at Portsmouth; and from this it is argued that the constitutional validity of the order was not determined, and therefore as to that matter the judgment is not *res judicata*. But the argument is not sound. The question of the constitutional validity of the order was distinctly presented by the appellant's petition and necessarily was resolved against him by the judgment affirming the order. Omitting to mention that question in the opinion did not eliminate it from the case or make the judgment of affirmance any the less an adjudication of it. But while the opinion makes no specific reference to the

attack on the constitutional validity of the order, it leaves no doubt that the court regarded that and other objections to the order as untenable, and on that basis affirmed it; for in the opinion the court says, "The finding of fact by the commission as to the intent and purpose of Grubb in seeking this side loop from Portsmouth to South Portsmouth and return was amply sustained by the records of the commission, and we see no error in the action of the commission denying that part of the application".

In his bill the appellant assails the validity of the order upon one ground not brought to the attention of the state court—a ground arising out of the granting to another interstate motor line of a cerificate to operate busses over a route including the loop at Portsmouth; and he insists that this ground of objection is not concluded by the judgment of the state court, and therefore is open to examination and adjudication upon its merits by the District Court. But the judgment has a broader operation as *res judicata* than is thus suggested. The certificate referred to was granted several months before the appellant applied for a certificate and he had personal knowledge of it from the time it was granted. It was shown upon the records of the Commission and was easily accessible when the hearing was had upon his application. Thus it is a matter which, if having the bearing now suggested, could have been brought to the attention of the Commission either at that hearing or in his request for a rehearing, section 543, General Statutes; and, if it was not then given proper effect, he could have brought it to the attention of the state court and have made the same claim in respect of it that is now made in his bill.

The thing presented for adjudication in the case in the state court was the validity of the order, and it was incumbent on the appellant to present in support of his asserted right of attack every available ground of which he had knowledge. He was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that. *Werlein* v. *New Orleans,* 177 U. S. 390, 398, *et seq; United States* v. *California and Oregon Land Co.,* 292 U. S. 355, 358.

As the ground just described was available but not put forward the appellant must abide the rule that a judgment upon the merits in one suit is *res judicata* in another where the parties and subject

matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end. *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 319; *United States* v. *Moser*, 266 U. S. 236, 241; *Cromwell* v. *County of Sac*, 94 U. S. 351, 352.

We think it follows from what has been said that the objections taken to the decree below are so unsubstantial that the motion to affirm without awaiting oral argument should be sustained.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.